The Barrie Guide to the Law of Evidence 2020

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THE LAW OF EVIDENCE

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A GENERAL INTRODUCTION

1 INTRODUCTION TO EVIDENCE

i. What is Evidence?

1.1 Oxford English Dictionary

1. The available body of facts or information indicating whether a belief or proposition is true or valid.

2. Information drawn from personal testimony, a document, or a material object, used to establish facts in a legal investigation or admissible as testimony in a law court.

1.2 **Murphy on Evidence**

Evidence is any material which has the potential to change the state of a fact-finder's belief with respect to any factual proposition which is to be decided and which is in dispute.

ii. What is the Law of Evidence?

1.3 **Murphy on Evidence**

The Law of Evidence is a collection of rules governing what facts may be proved in court, what materials may be placed before the court to prove those facts, and the form in which those materials should be placed before the court.

1.4 The Law of Evidence is not substantive law: it does not create causes of action, but rather regulates how the factual elements of substantive law (e.g. a breach of contract or a murder) may be established in a court of law. This is known as 'adjective' law, which also includes the rules of procedure and pleading etc.

iii. What are the Sources of the Law of Evidence?

1.5 Apart from the rules and practices deriving from the common law and the Civil and Criminal Procedure rules, the Law of Evidence comes from a range of legislative sources. These might involve clear regulations which must be followed, and those which give a discretion to the judge (e.g. in deciding whether relevant evidence is unduly prejudicial the defendant).

1.6 **The statutes include:**

Civil Evidence Act 1995
Coroners and Justice Act 2009
Criminal Evidence Act 1898
Criminal Justice Act 2003
Criminal Justice and Public Order Act 1994
Police and Criminal Evidence Act 1984
Youth Justice and Criminal Evidence Act 1999

iv. The Function of the Law of Evidence

1.7 Both the ancient rules of Natural Justice and the ECHR (as enshrined in the Human Rights Act 1998) lay down the foundations of the Law of Evidence, which is to ensure that any trial should be fair; that it should uphold the standards of a civilised society; and that it should achieve as accurate an outcome as possible.

1.8 **EUROPEAN CONVENTION ON HUMAN RIGHTS**

ARTICLE 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

3. Everyone charged with a criminal offence has the following minimum rights...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

ARTICLE 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

This can be relevant to the admissibility of confessions.

ARTICLE 8

Everyone has the right to respect for his private and family life, his home and his correspondence.

This can be relevant to the admissibility of evidence acquired by the unlawful violation of privacy.

v. The Operation of the Law of Evidence

1.9 Although the need for a fair trial (and investigation) applies to both civil and criminal cases, most of the rules concern criminal cases, where there is obviously more at stake for the defendant.

- His liberty and reputation are in jeopardy
- The opposition (the state) is bound to be more powerful and has nothing to lose

1.10 Most of the rules of evidence are exclusionary. They operate to filter out evidence that one of the parties might otherwise wish to present to the court. There are two reasons for needing such a filter:

PRACTICALITY

There may be vast amounts of evidence which it would take an excessive time to present; which might not all be relevant; and which might simply confuse the issues.

In a civil case, this may be managed by the judge simply limiting the time the parties have to present their case.

FAIRNESS

In a criminal case especially, there may be evidence which would be disproportionately prejudicial to the defendant, even if it does seem to have probative value.

This might be to do with the nature of the evidence itself; or because of the way in which the evidence was obtained.

1.11 In *M v. R (Child Abuse: Evidence)* [1996], Butler-Sloss LJ in the Court of Appeal cited with approval from the American Federal Rules of Evidence.

***M v. R (Child Abuse: Evidence)* [1996]**

"We would draw attention to rules 102 and 403 of the American Federal Rules of Evidence. Rule 102 requires the trial judge, while securing fairness: '… to eliminate unjustifiable expense and delay to the end that the truth may be ascertained and the proceedings justly determined.'

"Rule 403 provides: 'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'"

B TYPES OF EVIDENCE

2 TYPES OF EVIDENCE

i. The Facts in Issue

2.1 The claimant/prosecution must produce evidence to prove that the elements of the claim/offence are present. In a criminal case, this will usually mean establishing both the *actus reus* and *mens rea* of the crime. In a contract case, for example, it might be relevant to prove that a contract was made and what its terms were.

ii. Collateral Facts

2.2 There may be facts to be established which are relevant to the case but which are not directly related to the allegations. For example, whether a witness is credible or competent.

iii. Direct Evidence

2.3 This is evidence based on the first-hand knowledge of a witness. e.g. The store-detective saw Barrie place the camera into his bag and leave the store without paying for it.

iv. Circumstantial Evidence

2.4 This is evidence which makes an allegation more or less likely to be true, but is not the fact in issue. e.g. Barrie started running away when the store-detective called out to him.

2.5 Circumstantial evidence might be based on a generalisation about the accused which makes it more likely that he would commit the crime in question. For example, the fact that Barrie was a very keen photographer but could not afford to buy an expensive camera. It is a question of degree in each case as to whether such generalisations are really relevant or hold any weight,

2.6 ***Barry George v. R.*** **[2007] EWCA Crim 2722**

In this notorious case (which is discussed in detail later in the course) Barry George was wrongly convicted of murdering Jill Dando, a well-known television personality.

Part of the evidence against him was that he was obsessed with the victim of the crime in that he had a large collection of photographs of her. The prosecution claimed that this made it more likely that he was involved in her murder. In fact, the only non-circumstantial evidence against him was a microscopic spec of material found in his coat pocket which might have been gunshot residue.

Following the quashing of his original conviction, he was re-tried and found not guilty, having spent 8 years in prison.

v. Real Evidence

2.7 This relates to a physical object produced in evidence. e.g. The stolen camera discovered in Barrie's office and covered in his fingerprints.

vi. Testimonial Evidence

2.8 This is oral evidence given in court by a witness under oath (sometimes called 'sworn evidence'). The oath may be religious or secular, but in either case it is perjury to lie in court under oath.

vii. Hearsay Evidence

2.9 This usually means the evidence of someone who is not in court, given by a third party. e.g. The store-detective's wife testifies as to what her husband told her about seeing Barrie steal the camera.

2.10 The statutory definition is to be found in the Criminal Justice Act 2003, s.113 and 115

Criminal Justice Act 2003

s.113 A statement not made in oral evidence in the proceedings…

s.115 A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form… if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been to cause another person to believe the matter, or to cause another person to act or a machine to operate on the basis that the matter.

2.11 The main objection to permitting hearsay evidence is that the actual witness cannot be cross-examined as to the accuracy of the statement, and so it may be totally unreliable. Historically therefore such evidence was not permitted in court.

2.12 However, the law has substantially altered in recent years. The rule no longer applies at all in civil cases; and the Criminal Justice Act 2003 permits hearsay evidence in criminal cases in certain specified situations, such as when the actual witness is dead, or when "the court is satisfied that it is in the interests of justice for it to be admissible" – which is obviously an extremely wide exception.

2.13 This seems at first sight to conflict with the Article 6.3 requirement:

Article 6

Everyone charged with a criminal offence has the following minimum rights:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

However, the European Court of Human Rights has confirmed that States may reasonably depart from the strict letter of the Article without violating the ECHR.[1]

viii. Evidence of Good Character

2.14 The defendant may wish to produce evidence of his sainthood in order to make his guilt seem less likely. This was permitted at common law, but only as evidence of his general reputation, rather than his propensity to commit the actual crime in question, though this was always something of a rather fine line. The problem for the defendant is that if he produces evidence of his good character, it gives the prosecution the licence to produce contradictory evidence about his bad character.

2.15 The right for the defendant to produce good character evidence is specifically preserved in the Criminal Justice Act 2003.

Criminal Justice Act 2003 *s.118*

Any rule of law under which in criminal proceedings evidence of a person's reputation is admissible for the purpose of proving his good or bad character.

Note: The rule is preserved only so far as it allows the court to treat such evidence as proving the matter concerned.

[1] *Salabiaku v France* (1991) 13 EHRR 379.

ix. Evidence of Bad Character

2.16 The prosecution may wish to produce evidence of the defendant's bad character – especially relating to previous convictions – to show that it is more likely that he has committed the crime now being tried.

2.17 Under the old common law it was presumed that the prosecution could not bring up evidence of the defendant's bad character (particularly previous convictions) unless either:

i) The defendant had claimed to have no such antecedents; or
ii) The facts of the instant case were unusually similar to the facts of a previous case involving the defendant.

2.18 These rules were wiped away by the Criminal Justice Act 2003, which shifted the presumption towards *permitting* evidence of bad character, subject to meeting certain criteria – known as 'gateways'.

2.19 Assuming that the evidence is permitted, there is then the question of what weight should be given to such evidence by the jury and how they should be directed.

x. Identification Evidence

2.20 Following some scandalous miscarriages of justice caused through false identification evidence, the Devlin Committee was set up to investigate and review the procedures for identification evidence. It reported in 1976, leading eventually to Code D of PACE, which specifies how police identification procedures should be organised.

2.21 Whilst the Devlin Committee was deliberating, the Court of Appeal (Criminal Division) laid down certain guidelines which have become the benchmark for how a judge should direct a jury when identification evidence is key to the case. These are called the 'Turnbull Guidelines' after the name of the case: ***R. v. Turnbull*** **[1977] QB 224**

xi. Confessions

2.22 Under the Police and Criminal Evidence Act 1984 s.82 (1) "confession", includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise.

2.23 Whilst confessions are always likely to be relevant to the prosecution case, they may be excluded by the court, especially if they were made as a result of oppression or in circumstances which make them unreliable (such as under the influence of drugs).

C THE THREE PILLARS OF EVIDENCE

3 RELEVANCE, ADMISSIBILITY AND WEIGHT

3.1 There are three key elements to consider with any piece of evidence:

1. Is it relevant?
2. Is it admissible?
3. Does it have enough weight to tip the balance?

i. Relevance

3.2 If evidence is not relevant to the matter in dispute, it will not be admissible, or, if it has already been heard, the jury may be told to disregard it. Producing relevant evidence will be part of the evidential burden.[2] (See below)

3.3 **American Federal Rules of Evidence: Rule 401**

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ii. Admissibility

3.4 Even if evidence is relevant, it may yet be ruled inadmissible, either at common law or under statute. For example, under the Police and Criminal Evidence Act 1984, there is a general power for the court to exclude any prosecution evidence which is unduly prejudicial to the defendant.

3.5 **Police and Criminal Evidence Act 1984**

78.— Exclusion of unfair evidence

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

iii. Weight

3.6 Once the evidence is admitted, it is for the jury (or magistrates) to decide what weight to give it, though the jury may be influenced in this by the judge's direction.

3.7 If the evidence is very weak, this may affect whether the prosecution fulfils the evidential burden for the case to proceed at all. Where there is a particular piece of weak evidence, the judge may refuse to permit it to be presented to the jury if it is unduly prejudicial to the defendant.

3.8 **American Federal Rules of Evidence: Rule 403**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

[2] See Part 5 below.

D BURDENS OF PROOF

4 THE LEGAL BURDEN OF PROOF

4.1 The legal burden of proof is the obligation placed on one of the parties to prove the case. It is "the obligation of a party to meet the requirement that a fact in issue be proved (or disproved) either by a preponderance of the evidence or beyond reasonable doubt as the case may be." (Cross & Tapper)

4.2 The **legal** burden must be distinguished from the **evidential** burden[3] of establishing that there is sufficient evidence from either the claimant or the prosecution for there to be any realistic possibility that they could win the case. This is not a test of whether the evidence is necessarily strong or credible. The issue is whether – assuming the facts alleged by the prosecution are proven – they would be enough to lead to a conviction.

For example, if, in a criminal case, the prosecution's evidence does not add up to the elements of the offence with which the defendant is charged – even if it all proves to be true – then there will be 'no case to answer' and the judge will order the trial to end.

4.3 The general rule is that he who asserts must prove, so in a civil case this will usually be the claimant (or the appellant); and in a criminal case, it will usually be the prosecution (or the appellant).

This is a long-established common law principle, most famously stated by Viscount Sankey in:

Woolmington v. The Director of Public Prosecutions **[1935] AC 462**

Reginald Woolmington was 21½ years old. His wife, who was killed, was 17½. They had known each other for some time and upon August 25 they were married. Upon October 14 she gave birth to a child. Shortly after that there appears to have been some quarrelling between them and she left him upon November 22 and went to live with her mother. Woolmington apparently was anxious to get her to come back, but she did not come.

The prosecution proved that at about 9.15 in the morning of the 10th Mrs. Daisy Brine was hanging out her washing at the back of her house at 25 Newtown, Milborne Port. While she was engaged in that occupation, she heard voices from the next-door house, No. 24. She knew that in that house her niece, Reginald Woolmington's wife, was living. She heard and could recognize the voice of Reginald Woolmington saying something to the effect "are you going to come back home?" She could not hear the answer. Then the back door in No. 24 was slammed. She heard a voice in the kitchen but could not tell what it said. Then she heard the sound of a gun. Upon that she looked out of the front window and she saw Reginald Woolmington, whose voice she had heard just before speaking in the kitchen, go out and get upon his bicycle, which had been left or was standing against the wall of her house, No. 25. She called out to him but he gave no reply. He looked at her hard and then he rode away.

According to Reginald Woolmington's own story, having brooded over and deliberated upon the position all through the night of December 9, he went on the morning of the 10th in the usual way to the milking at his employer's farm, and while milking conceived this idea that he would take the old gun which was in the barn and he would take it up that morning to his wife's mother's house where she was living, and that he would show her that gun and tell her that he was going to commit suicide if she did not come back. He would take the gun up for the purpose of frightening her into coming back to him by causing her to think that he was going to commit suicide. He finished his milking, went back to his father's house, had breakfast and then left, taking with him a hack saw. He returned to the farm, went into the barn, got the gun, which had been used for rook shooting, sawed off the barrels of it, then took the only two cartridges which were there and put them into the gun. He took the two pieces of the barrel which he had sawn off and the hack saw, crossed a field about 60 yards wide and dropped them into the brook.

[3] See Part 5 below.

Having done that, he returned on his bicycle, with the gun in his overcoat pocket, to his father's house and changed his clothes. Then he got a piece of wire flex which he attached to the gun so that he could suspend it from his shoulder underneath his coat, and so went off to the house where his wife was living. He knocked at the door, went into the kitchen and asked her: "Are you coming back?" She made no answer. She came into the parlour, and on his asking her whether she would come back she replied she was going into service.

He then, so he says, threatened he would shoot himself, and went on to show her the gun and brought it across his waist, when it somehow went off and his wife fell down and he went out of the house.

He told the jury that it was an accident, that it was a pure accident; that whilst he was getting the gun from under his shoulder and was drawing it across his breast it accidentally went off and he was doing nothing unlawful, nothing wrong, and this was a pure accident.

The learned judge in summing-up the case to the jury said:-

"If you accept his evidence, you will have little doubt that she died in consequence of a gunshot wound which was inflicted by a gun which he had taken to this house, and which was in his hands, or in his possession, at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position: The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him: for the law will presume the fact to have been founded in malice until the contrary appeareth.' That has been the law of this country for all time since we had law. Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified."

At the end of his summing-up he added: *"The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident."*

The defendant was found guilty, and appealed on the basis that the judge had misdirected the jury: it was not for the defendant to prove his innocence, but for the prosecution to prove both the *actus reus* and the *mens rea* beyond all reasonable doubt. Allowing the appeal (and so overturning the conviction) the House of Lords gave its classic statement about the burden (and standard) of proof.

"Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in ***Rex v. Davies****, the headnote of which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental.*

*"****Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception****.*

"If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained." per Viscount Sankey at pages 481-48

4.4 The rule was enshrined in the European Convention on Human Rights, which came into force in 1953.

Article 6.2

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

4.5 The Human Rights Act 1998 has added an extra dimension to this, as it provides in s.3 (1) that, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. This has meant that the courts specifically need to consider whether statutory provisions which seem to place a burden of proof on the defendant are sufficiently just, reasonable and proportionate to be compliant with the Convention,

4.6 On that basis, the defendant is under no obligation to produce any evidence at all, though this may be a rather bad tactic if the prosecution's evidence is otherwise compelling.

4.7 Perhaps the most notorious case of a judge misdirecting a jury on the burden of proof came in the case of *R. v. Derek Bentley* in 1952, which was overturned by the Court of Appeal 46 years later. It is worth reading the appeal case in full to appreciate the dramatic (and in this case fatal) influence that a rogue judge can have over a jury if he or she does not explain the operation of the legal burden correctly.

4.8 ***R v. Derek William Bentley (Deceased)*** **[2001] 1 Cr App R 21**

On the evening of November 2, 1952 Police Constable Sidney Miles was shot dead in the execution of his duty on the roof of a warehouse in Croydon. Two men were charged with his murder: Christopher Craig, who was then aged 16, and Derek William Bentley, who was 19. They were convicted on December 11, in Bentley's case with a recommendation to mercy. The trial judge passed on each the only sentence permitted by law: on Craig, because of his age, that he be detained during Her Majesty's pleasure; on Bentley, sentence of death. He was executed on January 28.

The main thrust of the prosecution case was straightforward. Craig had deliberately and wilfully murdered P.C. Miles and the appellant had incited Craig to begin the shooting and, although technically under arrest at the actual time of the killing of Miles, was party to that murder and equally responsible in law.

In order to prove the appellant's participation, the prosecution relied heavily on what counsel described as "the most important observation that Bentley made that night", namely "Let him have it, Chris". That was said to be a deliberate incitement to murder Detective Constable Fairfax, who had just arrested the appellant. It led, it was said, to Craig immediately firing at and wounding D.C. Fairfax.

Bentley's case was that he had not incited Craig to fire the gun and had at no time been party to its use. He had not known that Craig had a gun until the first shot was fired and he had not used the words "Let him have it, Chris" or any words which amounted to an incitement to use the gun. He had been standing with D.C. Fairfax for an appreciable time, making no effort to get away from him and behaving in a wholly docile manner, when Craig had fired the fatal shot. He had not participated in the murder.

In the posthumous appeal against Bentley's conviction, the Court of Appeal found that there was no reliable evidence that Bentley had said "Let him have it"; nor that, even if he did, he meant Craig to shoot his gun at the policeman rather than to hand it over to him.

Furthermore, the trial judge in his summing up and direction to the jury did not give the defendants' case any appreciable weight, but rather suggested to the jury that unless they thought the defendants had established the killing was an accident, they must be found guilty of murder. He also did not properly explain the standard of proof required, but rather attempted to influence the jury against the defendants by emphasising the heroics of the victims.

In this case the prosecution has given abundant evidence for a case calling for an answer, and although the prisoners do not have to prove their innocence, when once a case is established against

them, they can give evidence, and they can call witnesses, and then you have to take their evidence as part of the sum of the case. The effect of a prisoner's evidence may be to satisfy you that he is innocent, it may be it causes you to have such doubt that you feel the case is not proved, and it may, and very often does, have a third effect: it may strengthen the evidence for the prosecution…

Extracts from the summing up of Lord Goddard, C.J. (the trial judge).

"Gentlemen of the jury, I started by saying this was a terrible case. It is dreadful to think that two lads, one, at any rate, coming, and I dare say the other, from decent homes, should with arms of this sort go out in these days to carry out unlawful enterprises like warehouse-breaking and finish by shooting policemen. You have a duty to the prisoners. You will remember, I know, and realise, I know that you owe a duty to the community and if young people, but not so young—they are responsible in law—commit crimes of this sort, it is right, quite independent of any question of punishment, that they should be convicted, and if you find good ground for convicting them, it is your duty to do it if you are satisfied with the evidence for the prosecution…

"Now let us take first of all the case of Craig: it is not disputed, and could not be disputed, that he fired the shot which killed that Police Constable. You are asked to say that the killing was accidental, and that therefore the offence is reduced to manslaughter. Gentlemen of the jury, it is the prerogative of the jury in any case where the charge is of murder to find a verdict of manslaughter, but they can only do it if the evidence satisfies them that the case is properly reducible to one of manslaughter—that is, not with regard to any consequence that may happen, but simply whether the facts show that the case ought to be regarded as one of manslaughter and not of murder… In that case the only possible way of reducing the crime to manslaughter is to show that the act was accidental, and not wilful—the act."

"There is one thing I am sure I can say with the assent of all you twelve gentlemen, that the police officers that night, and those three officers in particular, showed the highest gallantry and resolution; they were conspicuously brave. Are you going to say they are conspicuous liars?—because if their evidence is untrue that Bentley called out 'Let him have it, Chris!', those three officers are doing their best to swear away the life of that boy. If it is true, it is, of course, the most deadly piece of evidence against him. Do you believe that those three officers have come into the box and sworn what is deliberately untrue—those three officers who on that night showed a devotion to duty for which they are entitled to the thanks of the community?... Against that denial (which, of course, is the denial of a man in grievous peril) you will consider the evidence of the three police officers who have sworn to you positively that those words were said."

The Court of Appeal overturned the verdict.

"The jury must be clearly and unambiguously instructed that the burden of proving the guilt of the accused lies and lies only on the Crown, that (subject to exceptions not here relevant) there is no burden on the accused to prove anything and that if, on reviewing all the evidence, the jury are unsure of or are left in any reasonable doubt as to the guilt of the accused that doubt must be resolved in favour of the accused. Such an instruction has for very many years been regarded as a cardinal requirement of a properly conducted trial. The courts have not been willing to countenance departures from it. We cannot regard the direction in this case as satisfactory. By stressing the abundant evidence calling for an answer in support of the prosecution case, and by suggesting that that case had been "established", and by suggesting that there was a burden on Craig to satisfy the jury that the killing had been accidental (however little, on the facts of this case, the injustice caused to Craig thereby), the jury in our view could well have been left with the impression that the case against the appellant was proved and that they should convict him unless he had satisfied them of his innocence".

per Lord Bingham

5 THE EVIDENTIAL BURDEN OF PROOF

i. Introduction

5.1 Separate from the legal burden of proof, is the evidential burden of establishing that there is sufficient evidence from either the claimant or the prosecution for there to be any realistic possibility that they could win the case. This is not a test of whether the evidence is necessarily strong or credible. The issue is whether – assuming the facts alleged by the prosecution can be proved – they would be enough to lead to a conviction.

5.2 For example, if, in a criminal case, the prosecution's evidence does not add up to the elements of the offence with which the defendant is charged – even if it all proves to be true – then there will be 'no case to answer'.

Examples

(i) Barrie is charged with theft. The evidence is that he was shopping in Debenhams wearing a rucksack, and in turning round, he accidentally knocked an expensive vase off a display cabinet, smashing it into pieces. He refused to pay for it, claiming that it was not him who knocked it off.

Even if the prosecution prove that he did knock the vase over, they will not have discharged the evidential burden for the offence of theft, so the judge should not let the case continue: it does not matter if all the prosecution evidence can be proved. There is simply no case to answer on the charge made.

(ii) Barrie discovers a body in the woods whilst he is out walking his dog. As the murder has only recently occurred and no one else seems to be around, the police charge Barrie with the murder.

Although Barrie's presence at the murder scene is clearly a relevant piece of evidence, it would not, in itself, be enough to make a reasonable jury sure that he is the murderer. If that is all the evidence there is, the evidential burden on the prosecution would not be satisfied.

ii. Satisfying the Evidential Burden

5.3 The *evidential burden* does not require the prosecution to establish their case to the judge beyond all reasonable doubt: that is the *legal burden* and relates to the outcome of the case as decided by the jury. To satisfy the evidential burden, the prosecution just needs to establish that it has a viable (though not yet proven) case, in the absence of any defence.

5.4 ***R. v. Galbraith*** **[1981] 1 WLR 1039 (CA)**

On November 20, 1978, at the Ranelagh Yacht Club, Putney Bridge, in the early hours of the evening a fight broke out in the bar. There were a number of people present, amongst them being Darke, Begbe, Bohm, Dennis and Bindon. Knives were used. At least three men were stabbed, Darke fatally, Bindon seriously, and Dennis less so. There was in these circumstances no doubt that there had been an affray. The only question for the jury to decide was whether it had been established with a sufficient degree of certainty that George Charles Galbraith had been unlawfully taking part in that affray.

On November 13, 1979, at the Central Criminal Court, Galbraith, was convicted on an indictment charging that he fought and made an affray. He was sentenced to four years' imprisonment.

The prosecution evidence showed that there had been an affray in a bar in which at least three men were stabbed, one fatally. There were passages in the evidence of two witnesses which tended to show that the applicant had taken an active part in the affray, although in a statement to the police the applicant had maintained that at the time the affray was in progress, he had not been in the bar but downstairs in the lavatory.

At the close of the prosecution evidence a submission of no case to answer was rejected. Galbraith, who had made a statement from the dock, reiterating the self-exculpatory statement which he had made to the police, was convicted.

He appealed against the conviction on the basis that the judge was wrong to have permitted the case to proceed when the evidence that he was at the scene was too tenuous to be relied on. His appeal failed, and the Court of Appeal laid down the key principles.

i. When a submission of no case was made, the case was to be stopped when there was no evidence that the person charged had committed the crime alleged and was also to be stopped if the evidence was tenuous and the judge concluded that the prosecution's evidence taken at its highest was such that a properly directed jury could not properly convict on it;

ii. Where the prosecution's evidence was such that its strength or weakness depended on the view to be taken of the reliability of a witness or other matters which were, generally speaking, within the province of a jury and one possible view of the facts was that there was evidence on which they could properly conclude that the person charged was guilty, the matter was to be tried by them; that borderline cases were in the judge's discretion; and that, in the circumstances, the applicant's submission of no case to answer was properly rejected.

"How then should the judge approach a submission of "no case"?

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.

"There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge." per Lord Lane CJ

iii. The Crown Prosecution Service

5.5 Since the advent of the Crown Prosecution Service in 1986, the task of filtering criminal cases where there is no case to answer has fallen to this organization, so far fewer such cases should actually get as far as the court.

5.6 According to their website[4], the CPS filters cases in two stages. The CPS will only start or continue a prosecution if a case has passed both stages.

1. The evidential stage

This is the first stage in the decision to prosecute. Crown Prosecutors must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against each defendant on each charge. They must consider whether the evidence can be used and is reliable. They must also consider what the defence case may be and how that is likely to affect the prosecution case.

A "realistic prospect of conviction" is an objective test. It means that a jury or a bench of magistrates, properly directed in accordance with the law, will be more likely than not to convict the defendant of the charge alleged. (This is a separate test from the one that criminal courts themselves must apply. A jury or magistrates' court should only convict if it is sure of a defendant's guilt.) If the case does not pass the evidential stage, it must not go ahead, no matter how important or serious it may be.

[4] <https://www.cps.gov.uk/about-cps>.

2. The public interest stage

If the case does pass the evidential stage, Crown Prosecutors must then decide whether a prosecution is needed in the public interest. They must balance factors for and against prosecution carefully and fairly. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.

The factors considered at this stage will include[5]:

a) How serious is the offence committed? The more serious the offence, the more likely it is that a prosecution is required.

b) What is the level of culpability of the suspect? The greater the suspect's level of culpability, the more likely it is that a prosecution is required. Culpability is likely to be determined by the suspect's level of involvement; the extent to which the offending was premeditated and/or planned; whether they have previous criminal convictions and/or out-of-court disposals and any offending whilst on bail or whilst subject to a court order; whether the offending was or is likely to be continued, repeated or escalated; and the suspect's age or maturity.

c) What are the circumstances of and the harm caused to the victim? The circumstances of the victim are highly relevant. The greater the vulnerability of the victim, the more likely it is that a prosecution is required. This includes where a position of trust or authority exists between the suspect and victim.

d) Was the suspect under the age of 18 at the time of the offence? The best interests and welfare of the child or young person must be considered including whether a prosecution is likely to have an adverse impact on his or her future prospects that is disproportionate to the seriousness of the offending.

e) What is the impact on the community? The greater the impact of the offending on the community, the more likely it is that a prosecution is required. In considering this question, prosecutors should have regard to how community is an inclusive term and is not restricted to communities defined by location.

f) Is prosecution a proportionate response?

g) Do sources of information require protecting? In cases where public interest immunity does not apply, special care should be taken when proceeding with a prosecution where details may need to be made public that could harm sources of information, international relations or national security.

5.7 The public interest stage is not part of the evidential burden of the prosecution once the case has been approved by the CPS.

iv. Civil Cases

5.8 In a civil case, the evidential burden will be on the claimant, and as in a criminal case the judge will stop the proceedings if the claimant does not produce sufficient evidence for the merits of the claim to be considered. One quirk of civil cases which does not apply in criminal proceedings is the possibility of counter-claims, so it is possible for the evidential burden (and sometimes the legal burden) to shift between the parties, depending on the issue being argued.[6]

5.10 Another issue in civil cases is the use of the online Court Claim procedure for money claims up to £100,000. Under this procedure you may make a claim online and if the defendant does not respond within 14 days of service, you may claim judgment by default, even if you have submitted no evidence at all to support your claim.[7]

[5] <https://www.cps.gov.uk/sites/default/files/documents/publications/code_2013_accessible_english.pdf> [4.12].
[6] See *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation* [1942] AC 154.
[7] <https://www.gov.uk/make-money-claim>.

6 THE REVERSE BURDEN OF PROOF

i. Introduction

6.1 Despite the general rule that it is for the prosecution to make the case, there are some cases where the defendant is required to prove or disprove something, which will otherwise be presumed against him. In criminal law, for example, there is a presumption that everyone is sane, so if a defendant wishes to rely on the common law defence of insanity in a murder case, he must prove that he was insane at the time of the homicide. However, the standard of proof in such a case will only be 'on the balance of probabilities'.

6.2 As indicated by Viscount Sankey in ***Woolmington***, all other examples of the reverse burden are based on statutory provisions, which seem to require such an exception in particular cases. However, this is seldom straightforward, as the question as to whether the statute actually has that effect is one of statutory interpretation, and the courts have not been consistent as to which 'rules' of statutory interpretation to apply in such cases.

6.3 In particular, the rule under the Human Rights Act 1988 that a statute must be presumed to be compatible with the ECHR has caused some debate, as art 6 specifically states that: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Does this mean that the legal burden – or even the evidential burden - can now never be placed on the defendant? Clearly it still can, but where is the line to be drawn?

6.4 In ***Salabiaku v. France*** **(1988) 13 EHRR 379,** the European Court of Human Rights held that the presumption of innocence under article 6 was not an absolute principle, and only needed to be applied within reasonable limits, subject to the test of proportionality. This gives leave to the domestic courts in the UK to reverse the burden within these limits.

6.5 In a seminal article in the Criminal Law Review 2005[8], Ian Dennis surveyed the major cases in this area to detect what criteria the courts were using to decide whether to reverse both the legal and evidential burdens. He identified several factors which appeared to affect the decisions:

- **Judicial Deference to Parliament:** If a statute makes it clear that Parliament intended to reverse the burden of proof, the courts will defer to this, though the question might still be open as to whether to reverse the legal burden or just the evidential burden.
- **Regulatory Offences:** The burden was more likely to be reversed where the offence is 'regulatory' and the issue is simply whether the defendant has complied with the regulations.
- **Defence v. Element of the Offence:** The defendant is more likely to be asked to prove a specific defence than to prove that an essential element of the crime has been committed, though sometimes the latter may happen, especially where the crime is to do an otherwise lawful act without the required permit. This overlaps with the next criterion.
- **Ease of Proof and Peculiar Knowledge:** For the sake of practicality and common sense, if proving a defence is something the defendant could easily do (e.g. by producing the required licence), then it would not be unreasonable to ask him to do it.

6.6 It is more common for the courts to find that just the evidential burden has been reversed by a statute, than to reverse both the evidential and legal burden. In such cases, the defendant may have to produce some palpable evidence to give rise to the claimed defence, but he does not have the legal burden to prove it. This is obviously more likely to be article 6 compliant.

[8] I Hunt, Reverse onuses and the presumption of innocence: in search of principle, Crim LR 2005, Dec, 901-936.

ii. The Pre-Human Rights Act 1998 Cases

6.7 ***R. v. Edwards*** **[1975] QB 27**

The Court of Appeal held that where a statute prohibits an act except under certain conditions, the legal burden could fall on the defendant to prove that he has met those conditions.

Errington Edwards was convicted of selling intoxicating liquor without a justices' licence contrary to section 160 (1) (a) of the Licensing Act 1964. He was unrepresented at the trial and did not give evidence, but made an unsworn statement denying the occupation of the premises. On his appeal against conviction on the ground that, since the prosecution had access to the register of licences under section 34 (2) of the Act, the prosecution should have called evidence to prove that there was no justices' licence in force:-

Held, dismissing the appeal:

(1) That there was an exception to the fundamental rule of the criminal law that the prosecution had to prove every element of the offence charged, which was limited to offences arising under enactments which prohibited the doing of an act but subject to provisos or exemptions; and that its application was not dependent upon either the fact, or the presumption, that the defendant had peculiar knowledge enabling him to prove the positive of a negative averment

(2) That if on the true construction of an enactment it prohibited the doing of a certain act, save in specified circumstances, it was not for the prosecution to prove a *prima facie* case of lack of excuse or qualification for the onus of proof shifted and it was for the defendant to prove that he was entitled to do the prohibited act and, accordingly, in the present case the defendant had to prove that he held a justices' licence

"In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception.

"In our judgment its application does not depend upon either the fact, or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. As Wigmore pointed out in his great Treatise on Evidence (1905), vol. 4, p. 3525, this concept of peculiar knowledge furnishes no working rule. If it did, defendants would have to prove lack of intent. What does provide a working rule is what the common law evolved from a rule of pleading. We have striven to identify it in this judgment. Like nearly all rules it could be applied oppressively; but the courts have ample powers to curb and discourage oppressive prosecutors and do not hesitate to use them.

"Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation upon an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like; and secondly, what shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden." per Lawton LJ

6.8 ***R. v. Hunt*** **[1987] AC 352**

The House of Lords held that where a statute prohibits the doing of a specific act, it is up to the prosecution to prove that all elements of the prohibited act have actually taken place: the defendant does not have to prove that the act has *not* taken place.

Police officers found in Richard Hunt's home a paper fold containing 154 milligrams of a white powder which, when analysed, was found to be morphine mixed with caffeine and atropine. He was charged under section 5(2) of the Act of 1971 with unlawful possession of a controlled drug morphine.

Under Regulation 4(1) of the Misuse of Drugs Regulations 1973, the Act does not apply to "any preparation of medicinal opium or of morphine containing ... not more than 0.2 per cent. of morphine."

The prosecution did not produce any evidence of the proportion of morphine in the powder the police had found, and the defendant submitted that there was no case to answer. When the judge would not allow this, the defendant pleaded guilty.

The House of Lords held that the composition of the morphine was an essential element of the offence, **which it was for the prosecution to prove**, so the plea of no case to answer should have been upheld.

"I would summarise the position thus far by saying that Woolmington [1935] A.C. 462 did not lay down a rule that the burden of proving a statutory defence only lay upon the defendant if the statute specifically so provided: that a statute can, on its true construction, place a burden of proof on the defendant although it does not do so expressly: that if a burden of proof is placed on the defendant it is the same burden whether the case be tried summarily or on indictment, namely, a burden that has to be discharged on the balance of probabilities.

"The real difficulty in these cases lies in determining upon whom Parliament intended to place the burden of proof when the statute has not expressly so provided. It presents particularly difficult problems of construction when what might be regarded as a matter of defence appears in a clause creating the offence rather than in some subsequent proviso from which it may more readily be inferred that it was intended to provide for a separate defence which a defendant must set up and prove if he wishes to avail himself of it. This difficulty was acutely demonstrated in ***Nimmo v. Alexander Cowan & Sons Ltd.*** *[1968] A.C. 107 . Section 29(1) of the Factories Act 1961 provides:*

"There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there."

"The question before the House was whether the burden of proving that it was not reasonably practicable to make the working place safe lay upon the defendant or the plaintiff in a civil action. However, as the section also created a summary offence the same question would have arisen in a prosecution. In the event, the House divided three to two on the construction of the section, Lord Reid and Lord Wilberforce holding that the section required the plaintiff or prosecution to prove that it was reasonably practicable to make the working place safe, the majority, Lord Guest, Lord Upjohn and Lord Pearson, holding that if the plaintiff or prosecution proved that the working place was not safe it was for the defendant to excuse himself by proving that it was not reasonably practicable to make it safe. However, their Lordships were in agreement that if the linguistic construction of the statute did not clearly indicate upon whom the burden should lie the court should look to other considerations to determine the intention of Parliament such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case and a court should be very slow to draw any such inference from the language of a statute…

"I have little doubt that the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which do not fall within this formulation are likely to be exceedingly rare... In the final analysis each case must turn upon the construction of the particular legislation to determine whether the defence is an exception within the meaning of section 101 of the Act of 1980 which the Court of Appeal rightly decided reflects the rule for trials on indictment." per Lord Griffiths

iii. The Post-Human Rights Act 1998 Cases

6.9 The cases decided since the enactment of the HRA at first adopted a stricter approach to the presumption of innocence, but later cases seemed to be less dogmatic. In *Sheldrake v. DPP*[9] however, the House of Lords said that all the major cases could be reconciled and were therefore not inconsistent with each other.

6.10 ***R. v. Lambert, Ali and Jordan*** **[2002] 2 AC 545**

The House of Lords stated *obiter* that the legal burden could only be reversed by statute where this was justified and proportionate. Otherwise, any statute which required such a reversal would be incompatible with the ECHR.

Steven Lambert was found in possession of a duffle bag containing two kilograms of cocaine worth over £140,000. He was found guilty of possession with intent to supply, contrary to s.5 of the Misuse of Drugs Act 1971 and sentenced to seven years in prison. Lambert had relied on the defence under s.28 of the Act, that he did not believe or have any reason to suspect that the bag contained a controlled drug.

The judge directed the jury that as long as it was proven that he was in possession of the drug, it was up to the defendant to prove – on the balance of probabilities - that he had the s.28 defence: in other words, that he had the legal burden of proving the defence.

Lambert appealed on the basis that this interpretation of s.28 was incompatible with the presumption of innocence under Article 6, as enshrined into law by the HRA.

The House of Lords held that the HRA did not apply to this case at all, as the incident took place before it was passed, so the appeal failed.

However, Lord Steyn did discuss the effect of the HRA on the reverse burden of proof, and stated that the issue of compatibility should be approached with a three-stage test:

i) Has there been a legislative interference with the presumption in Art 6 (2)?
ii) If so, is there an objective justification for such interference?
iii) If so, is the interference proportionate – i.e. no greater than necessary.

In this case, Lord Steyn thought that although there was justification for the requirement that the defendant should prove that he was unaware of the contents of his bag (given that drug smugglers will typically hide drugs and so could always claim to be unaware of their presence), the serious nature of the offence – with a possible sentence of life imprisonment – meant that it was not proportionate to expect the defendant to have more than an evidential burden regarding his lack of knowledge: the legal burden must remain with the prosecution.

6.11 ***R v. Davies (David Janway)*** **[2002] EWCA Crim 2949**

In one of several cases involving the Health and Safety at Work Act 1974, the court held that it was justified, necessary and proportionate to the impose on the defendant the legal burden of proving he had taken all practicable steps to ensure the health and safety of people who might be affected by his undertaking.

The factors considered included:

- that it was a regulatory offence;
- the potential defendants are people who have voluntarily entered upon risky enterprises for commercial gain;
- the defence is only necessary once it has been shown that the defendant was in breach of a duty;
- the facts relied on in support of the defence should not be difficult to prove because they will be within the knowledge of the defendant;

[9] [2005] 1 AC 264.

- to require the prosecution to prove that the defendant did not take the necessary steps – despite whatever tragedy has occurred - would thwart the purpose of Parliament in passing the statute.

HSWA 1974 s.3(1) provides that: It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

HSWA 1974 s.40 provides that: In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.

David Davies ran a plant hire firm from a yard and workshop near Neath. He had three employees and employed three self-employed subcontractors, one of whom was Mr Gardner. On 25 January 2000 Mr Gardner returned to the yard at about 3.30 p m and asked the defendant if there was any further work for him to do. The defendant was in the workshop working on a Volvo dumper truck. He told Mr Gardner that he should go home and then shouted to an employee, Mr Ralph, who was in the yard, to bring a JCB down into the workshop and park it tight up to the dumper. Mr Ralph reversed the JCB with its lights flashing down into the open workshop but as he approached the truck, he had to retract the machine's rear arm which left him with very little visibility to the rear. Mr Gardner was crushed between the two vehicles and sustained fatal injuries. Mr Ralph did not see Mr Gardner before the accident. T

A Health and Safety Executive witness produced a leaflet entitled “Reversing vehicles”. This said that nearly a quarter of all deaths involving vehicles at work occur while the vehicle is reversing and that most happen at low speeds and could be prevented by taking some simple safety precautions. These included the use of a banksman to ensure safe reversing. The defendant and Mr Ralph said that they had never used a banksman and did not consider that one was required.

The defence case was that by telling Mr Gardner to go home before the accident, by shouting an instruction to Mr Ralph which Mr Gardner should have been able to hear and by relying on the noise and lights of the JCB to alert Mr Gardner to the danger, the defendant had done all that was reasonably practicable. The Crown submitted he had not. He had not ensured that Mr Gardner was safely out of the way before returning to work on the truck and could have guided the JCB back himself.

Davies, was convicted. He was fined £15,000 and ordered to pay £22,544.32 prosecution costs.

Following a submission made at the close of the prosecution case, the judge, Judge Price QC, ruled that s.40 was compatible with the Convention and directed the jury that there was a legal (persuasive) burden on the defendant to prove (on the balance of probability) that it was not reasonably practicable for him to do more than he had in fact done.

Davies appealed against this ruling – and the consequent misdirection of the jury - contending that s.40 is only compatible if it is read down so as to impose a mere evidential burden.

The Court of Appeal agreed with the trial judge that s.40 was Convention compliant as imposing a legal burden.

“We have concluded that the imposition of a legal burden of proof in section 40 of the 1974 Act is justified, necessary and proportionate for the reasons which we set out below which take account of the various points we have discussed above.

“First the Act is regulatory and its purpose is to protect the health and safety of those affected by the activities referred to in ss 2 to 6…

“The reversal of the burden of proof takes into account the fact that duty holders are persons who have chosen to engage in work or commercial activity (probably for gain) and are in charge of it. They are not therefore unengaged or disinterested members of the public and in choosing to operate in a regulated sphere of activity they must be taken to have accepted the regulatory controls that go with it. This regulatory regime imposes a continuing duty to ensure a state of affairs, a safety standard. Where the enforcing authority can show that this has not been achieved it is not unjustifiable or unfair

to ask the duty holder who has either created or is in control of the risk to show that it was not reasonably practicable for him to have done more than he did to prevent or avoid it.

"Before any question of reverse onus arises the prosecution must prove that the defendant owes the duty… and that the safety standard… has been breached…

"The reverse onus only applies to breach of the duties laid down by sections 2 to 6 of the Act. It does not apply to section 7 , so there is no reverse onus of proof where it is alleged that an employee has breached his duty. The same applies to section 37 where a company's officers may be convicted if the company has committed an offence and they are proved to have consented, connived at or contributed to it by neglect. This suggests that Parliament must have considered when a reverse onus was justified and when it was not. Due regard must be paid to its choice.

"The facts relied on in support of the defence should not be difficult to prove because they will be within the knowledge of the defendant. Whether the defendant should have done more will be judged objectively.

"If all the defendant had to do was raise the defence to require the prosecution to disprove it, the focus of the statutory scheme would be changed. The trial would become focused on what it was the enforcing authority was saying should have been done rather than on what the defendant had done or ought to have done which is what Parliament intended." per Tuckey LJ paras 23-28

6.12 ***R v. Johnstone*** **[2003] 1 WLR 1736**

It is a defence for someone charged with trademark infringement to prove that he believed on reasonable grounds that he was not committing such an infringement. The House of Lords stated *obiter* that it was not incompatible with Article 6 to place the burden of proving this on the defendant, rather than requiring the prosecution to prove that he had no such grounds.

Robert Johnstone was found guilty of trademark infringement having been discovered with over 1,000 bootleg copies of recordings by well-known artistes with their names on the labels.

He successfully appealed on the basis that he had not infringed the trademarks of the performers merely by having their names on the discs and tapes: their names were not their trademarks.

The House of Lords considered *obiter* whether the defence afforded by the Trade Marks Act 1994, s.92 (5) was compatible with Article 6. This provides that:

It is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.

The requirement for the defendant to show what he believed seems to be a clear reversal of the burden of proof, and as such would prima facie be incompatible with the ECHR. However, Lord Nicholls opined that partly because the crime was so serious, it was fair and proportionate to place this burden on the defendant. (Contrast this with Lord Steyn's logic in ***R. v. Lambert, Ali and Jordan*** [2002] 2 AC 545).

"First, I entertain no doubt that, unless this interpretation is incompatible with article 6(2) of the Convention, section 92(5) should be interpreted as imposing on the accused person the burden of proving the relevant facts on the balance of probability. Unless he proves these facts, he does not make good the defence provided by section 92(5). The contrary interpretation of section 92(5) involves substantial rewriting of the subsection. It would not be sufficient to read the subsection as meaning that it is a defence for a person charged to raise an issue on the facts in question. That would not be sufficient, because raising an issue does not provide the person charged with a defence. It provides him with a defence only if, he having raised an issue, the prosecution then fails to disprove the relevant facts beyond reasonable doubt. I do not believe section 92(5) can be so read. I do not believe that is what Parliament intended.

"The question which next arises is whether this interpretation, namely, that section 92(5) imposes a "legal" or "persuasive" onus on the person charged, is compatible with the presumption of innocence contained in article 6(2) of the European Convention on Human Rights. Prima facie this interpretation derogates from that principle. That much is clear. On this interpretation section 92(5) sets out facts a defendant must establish if he is to avoid conviction. These facts are presumed against him unless he establishes the contrary.

"That is not the end of the matter. The European Court of Human Rights has recognised that the Convention does not, in principle, prohibit presumptions of fact or law. What article 6(2) requires is that they must be confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence: ***Salabiaku v France*** *(1988) 13 EHRR 379 , 388, para 28. Thus, as elsewhere in the Convention, a reasonable balance has to be held between the public interest and the interests of the individual. In each case it is for the state to show that the balance held in the legislation is reasonable. The derogation from the presumption of innocence requires justification.*

"Identifying the requirements of a reasonable balance is not as easy as might seem. One is seeking to balance incommensurables. At the heart of the difficulty is the paradox noted by Sachs J in ***State v Coetzee*** *[1997] 2 LRC 593, 677, para 220: the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important the constitutional protection of the accused becomes. In the face of this paradox all that can be said is that for a reverse burden of proof to be acceptable there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence.*

"The relevant factors to be take into account when considering whether such a reason exists have been considered in several recent authorities, in particular the decisions of the House in ***R v Director of Public Prosecutions, ex parte Kebilene*** *[2000] 2 AC 326 and* ***R v Lambert*** *[2002] 2 AC 545. And there is now a lengthening list of decisions of the Court of Appeal and other courts in respect of particular statutory provisions. A sound starting point is to remember that if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused: see Dickson CJ in* ***R v Whyte*** *(1988) 51 DLR (4th) 481, 493.* This *consequence of a reverse burden of proof should colour one's approach when evaluating the reasons why it is said that, in the absence of a persuasive burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons.*

"The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access.

"In evaluating these factors, the court's role is one of review. Parliament, not the court, is charged with the primary responsibility for deciding, as a matter of policy, what should be the constituent elements of a criminal offence. I echo the words of Lord Woolf in ***Attorney General of Hong Kong v Lee Kwong-kut*** *[1993] AC 951, 975: "In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime."*

The court will reach a different conclusion from the legislature only when it is apparent the legislature has attached insufficient importance to the fundamental right of an individual to be presumed innocent until proved guilty.

"I turn to section 92 (1) Counterfeiting is fraudulent trading. It is a serious contemporary problem. Counterfeiting has adverse economic effects on genuine trade. It also has adverse effects on consumers, in terms of quality of goods and, sometimes, on the health or safety of consumers. The Commission of the European Communities has noted the scale of this "widespread phenomenon with a global impact": Green Paper, Combating Counterfeiting and Piracy in the Single Market, COM (98) 569 final, para 1.1. Urgent steps are needed to combat counterfeiting and piracy: see the Green Paper and its follow-up, Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee COM (2000) 789 final. Protection of consumers and honest manufacturers and traders from counterfeiting is an important policy consideration. (2) The offences created by section 92 have rightly been described as offences of "near absolute liability". The prosecution is not required to prove intent to infringe a registered trade mark. (3) The offences attract a serious level of punishment: a maximum penalty on indictment of an unlimited fine or imprisonment for up to 10 years or both, together with the possibility of confiscation and deprivation orders. (4) Those who trade in brand products are aware of the need to be on guard against counterfeit goods. They are aware of the need to deal with reputable suppliers and keep records and of the risks they take if they do not. (5) The section 92(5) defence relates to facts within the accused person's own knowledge: his

state of mind, and the reasons why he held the belief in question. His sources of supply are known to him. (6) Conversely, by and large it is to be expected that those who supply traders with counterfeit products, if traceable at all by outside investigators, are unlikely to be co-operative. So, in practice, if the prosecution must prove that a trader acted dishonestly, fewer investigations will be undertaken and fewer prosecutions will take place.

"In my view factors (4) and (6) constitute compelling reasons why the section 92(5) defence should place a persuasive burden on the accused person. Taking all the factors mentioned above into account, these reasons justify the loss of protection which will be suffered by the individual. Given the importance and difficulty of combating counterfeiting, and given the comparative ease with which an accused can raise an issue about his honesty, overall it is fair and reasonable to require a trader, should need arise, to prove on the balance of probability that he honestly and reasonably believed the goods were genuine.

"For these reasons, which are substantially the same as those given by Rose LJ in ***R v S (Trade mark defence****) [2003] 1 Cr App R 602 , I consider the persuasive burden placed on an accused person by the section 92(5) defence is compatible with article 6(2)."* per Lord Nicholls paras 46-53

6.13 ***DPP v. Barker*** **[2004] EWHC 2502 (Admin) Case Stated**

Where a statute prohibited driving without a valid licence, it was wholly proportionate to require the defendant to produce the licence.

Barker was charged with driving a motor vehicle while disqualified contrary to s.103 of the Road Traffic Act 1988. On an earlier occasion he had been disqualified from holding or obtaining a driving licence for 12 months and further disqualified until he passed an extended driving test, pursuant to s.34 and s.36 of the Road Traffic Offenders Act 1988. The 12 months had elapsed by the time of the offence, but he was still subject to the requirement to pass the test.

At the magistrates' court, the justices found as a fact that the defendant had been driving. However, they ruled that the burden was on the prosecution to establish that the defendant had not obtained a licence and was not, in fact, driving in accordance with the terms of such a licence so as to fall within the exemption provided by s.37(3) of the Road Traffic Offenders Act 1988. The prosecution appealed by way of case stated.

Held, allowing the appeal, the burden fell upon a defendant to show that he not only had a provisional licence, but was driving in accordance with the conditions of such a licence pursuant to s.37(3). Section 101 of the Magistrates' Courts Act 1980, which provided that if a defendant for his defence relied on any exemption the burden lay on him of proving that exemption, applied.

That burden was wholly proportionate since:

- It was one which was easily discharged by him producing the licence which had been issued.
- it would be quite impossible in some cases for the prosecution to establish that any passenger was the holder of a licence himself and thus qualified to be supervising the driver.
- In the absence of any information from the defendant as to the identity of the passenger, the prosecution would be in no position at all to know that.

In the present case, the absence of any such evidence meant that, as the justices were satisfied that he was the driver, they should have convicted him. Accordingly, the matter was remitted back to them with a direction to convict.

6.14 ***Sheldrake v. DPP*** **[2005] 1 AC 264**

It is a defence for someone charged with being in charge of a vehicle whilst over the alcohol limit to prove that there was no likelihood of his driving the vehicle whilst over the limit. The House of Lords stated *obiter* that it was not incompatible with Article 6 to place the burden of proving this on the defendant, rather than requiring the prosecution to prove that there was such a likelihood.

The Road Traffic Act 1988, s 5 provides:

Driving or being in charge of a motor vehicle with alcohol concentration above prescribed limit.

(1) If a person—
(a) drives or attempts to drive a motor vehicle on a road or other public place, or
(b) is in charge of a motor vehicle on a road or other public place,
after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.

(2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.

Sheldrake was convicted under s.5 (1)(b), and appealed on the basis that the defence under section 5(2), which cast upon the defendant the burden of proving that there was no likelihood of his driving the vehicle while over the limit, was not compliant with the presumption of innocence guaranteed by article 6(2).

It was held that it was so compliant.

(1) The justifiability and fairness of provisions which imposed a burden of proof on a defendant in a criminal trial had to be judged in the particular context of each case, and the court's task was to decide whether Parliament had unjustifiably infringed the presumption of innocence; that the overriding concern was that a trial should be fair, and the presumption of innocence was a fundamental right directed to that end; that the Convention did not outlaw presumptions of fact or law but required that they should be kept within reasonable limits and should not be arbitrary; that it was open to states to define the constituent elements of a criminal offence, excluding the requirement of *mens rea*; but that the substance and effect of any presumption adverse to a defendant had to be examined on all the facts and circumstances of a particular provision and had to be reasonable; and that relevant to any judgment on reasonableness or proportionality would be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what was at stake and the difficulty which a prosecutor might find in the absence of a presumption.

(2) That section 5(2) of the 1988 Act imposed a legal burden on a defendant who was charged with an offence contrary to section 5(1)(b) and was directed to a legitimate objective, namely the prevention of death, injury and damage caused by unfit drivers; that the offence under section 5(1)(b) did not require proof that the defendant was likely to drive whilst unfit, but the defendant was given the opportunity by section 5(2) to exonerate himself if he could show that there was no such likelihood; that the likelihood of the defendant driving was a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecution to prove, beyond reasonable doubt, that he would; that the imposition of a legal burden upon the defendant did not go beyond what was necessary and reasonable, and was not in any way arbitrary; and that, accordingly, the defendant's conviction of an offence under section 5(1)(b) resulting from a failure to establish a defence under section 5(2) could not be regarded as unfair.

6.15 ***R v. Chargot*** **[2009] 1 WLR 1 (HL)**

The case upheld the decision in *R v. Davies (David Janway)* (2002) (6.11 above) in holding that s.40 of the HSWA 1974 legitimately places the legal burden of proving the defence onto the defendant.

It is interesting to note that by the time of this case, the maximum penalty for breach of the HSWA 1974 had substantially increased since the time of *R v. Davies*, where the purely regulatory nature of the offence had been a key factor. It is now possible to get up to two years' imprisonment and an unlimited fine.[10] However, Lord Hope did not think that significantly shifted the balance of proportionality.

[10] Health and Safety (Offences) Act 2008, section 1(1) and (2) and Schedule 1 .

"The penalties that may be imposed on an individual have now been increased... But I do not think that, when account is taken of the purposes that this legislation is intended to serve, this alteration in the law renders what was previously proportionate disproportionate." per Lord Hope, para 30

On 10 January 2003 Shaun Riley was working for Chargot Ltd, at Heskin Hall Farm, near Chorley in Lancashire. Extensive works were being carried out on the farm, which was owned by the Ruttle group of companies. Ruttle Contracting Ltd, a member of the group, was the principal contractor. The works included the construction of a car park. This required the excavation from the site of a quantity of topsoil. A dumper truck was then used to move the spoil over a distance of about 500 yards to a depression in a field, beside which a ramp had been created to provide the dumper truck with a means of access.

During the previous day and for part of the morning on the day in question the dumper truck was driven by another employee. But he left the farm after receiving a telephone call telling him that his mother had been injured in a road accident. Shaun Riley was asked by the foreman to take over the driving of it. He made two trips carrying spoil from the car park to the depression without incident.

While he was making a further trip that afternoon he met with an accident. The dumper truck tipped over on its side and he was buried by the load of spoil that he was transporting. It was some time before he could be pulled out, and attempts to revive him were unsuccessful. He died the following day in hospital.

Criminal proceedings were brought against Chargot Ltd, alleging a breach of section 2(1) of the Act. The case against it was that it had failed to ensure, so far as was reasonably practicable, the health and safety at work of its employees. As the operations were under its control, Ruttle Contracting Ltd was also prosecuted. In its case the allegation was that there had been a breach of section 3(1). This was because it had failed to conduct the undertaking in such a way as to ensure, so far as was reasonably practicable, that persons not in its employment who might be affected thereby were not exposed to risks to their health and safety.

The defendants maintained, pursuant to section 40 of the Act, that they had done everything that was reasonably practicable to ensure the safety of the deceased and other workers.

On 10 November 2006 the defendants were found guilty of the charges that had been brought against them. The Chargot Ltd was fined £75,000 and ordered to pay £37,500 costs. Ruttle Contracting Ltd was fined £100,000 and ordered to pay £75,000 costs.

They appealed on the ground that the prosecution had failed to identify the scope of the duty alleged to have been breached by reference to criticisms of the way in which the work had been conducted. The appeals were dismissed by both the Court of Appeal and the House of Lords.

On the issue of the reversal of the legal burden in s.40, Lord Hope said this:

"Section 40 imposes a reverse burden of proof on the employer. In ***Sheldrake v Director of Public Prosecutions*** *[2005] 1 AC 264 , para 21, Lord Bingham of Cornhill said that the justifiability of any infringement of the presumption of any innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.*

"He drew attention, in para 30, to the difference between the subject matter in ***R. v. Lambert*** *[2002] 2 AC 545 on the one hand, where it was held that the imposition of a legal burden on the defendant undermined the presumption of innocence, and* ***R. v. Johnstone*** *[2003] 1 WLR 1736 on the other, where it was held that there were compelling reasons why there should be a legal burden. In the former case, where section 28 of the Misuse of Drugs Act 1971 was in issue, a defendant might be entirely ignorant of what he was carrying. In the latter, offences under section 92 of the Trade Marks Act 1994 are committed by dealers, traders and market operators who could reasonably be expected to exercise some care about the provenance of goods in which they deal. It seems to me that the situation in which the reverse burden imposed by section 40 of the 1974 Act arises is analogous to that in* ***R. v. Johnstone*** *. Sections 2 and 3 impose duties on employers who may reasonably be expected to accept the general principles on which those sections are based and to have the means of fulfilling that responsibility.*

*"In **R. v. Davies (David Janway)** [2003] ICR 586 the judge ruled against a submission that section 40 was not compatible with the presumption of innocence in article 6(1) of the European Convention on Human Rights unless the section was read down so as to impose only an evidential burden on the employer. His decision was upheld by the Court of Appeal. Delivering the judgment of the court, Tuckey LJ said that it had concluded that the imposition of a legal burden of proof was justified, necessary and proportionate. Regard had to be had to the fact that the Act's purpose was both social and economic, to the fact that duty holders were persons who had chosen to engage in work or commercial activity and were in charge of it and that in choosing to operate in a regulated sphere they must be taken to have accepted the regulatory controls that went with it. …*

"In my opinion the Court of Appeal reached the right decision in that case, and it did so essentially for the right reasons." per Lord Hope, paras 28-30

6.16 ***R. v. Williams (Orette)*** **[2012] EWCA Crim 2162**

It is an offence to possess an imitation fire-arm without a licence if it is readily convertible into a live fire-arm. Under s.1(5) of the Firearms Act 1982, it is a defence to such a charge that you did not know and had no reason to suspect that it could be so converted.

It was held by the Court of Appeal that this section imposed a legal burden on the defendant which was Convention compliant.

Orette Williams was found guilty of possessing a prohibited weapon, contrary to section 5(1)(a) of the Firearms Act 1968 (as amended). He was sent to prison for five years.

The relevant weapon was an imitation 9 m**m** calibre gun, capable of firing blanks, which was readily convertible into a live firearm.

Under the Firearms Act 1982, there is a defence to a charge of possessing such a weapon, as follows:

s.1. (5) In any proceedings brought by virtue of this section for an offence under the 1968 Act involving an imitation firearm to which this Act applies, it shall be a defence for the accused to show that he did not know and had no reason to suspect that the imitation firearm was so constructed or adapted as to be readily convertible into a firearm to which section 1 of that Act applies.

The question arose as to whether this section legitimately imposed a legal burden of proof on the defendant, so that it was up to him to prove (on the balance of probabilities) that he did not know that the imitation firearm could be readily converted, rather than simply creating an evidential burden on him to show that such a defence might apply, which the prosecution would then have to refute.

The Court of Appeal held that the legal burden was indeed on the defendant.

"In our judgment, there are compelling reasons for concluding that section 1(5) imposes a legal burden on the defendant.

"Firearms offences—any firearms offences—are a very serious problem. Where those firearms stand to be lethal—as in the case of readily convertible imitation firearms—the need for protection of the public is obvious. That is reflected by the (legitimate) creation of a number of strict liability offences in this context… In circumstances where, nevertheless, Parliament has, by section 1(5) of the 1982 Act, considered it appropriate that a defence of lack of knowledge or reason to suspect in such cases be available it is, in our judgment, justified and proportionate that the legal burden of such defence—a defence made available as an exception or modification to the strict liability approach—be placed on the accused.

"Further, the question of knowledge (or lack of it) involves facts readily available to the accused—he knows the circumstances in which and from whom he obtained the item. Likewise, as to the issue of whether he "had no reason to suspect" that the imitation firearm was so constructed or adapted as to be readily convertible. No great difficulty is placed in the way of a defendant in that regard. On the other hand, it could be very difficult indeed for prosecutors, and would be a real deterrent to prosecution let alone successful prosecution, if the burden were placed on the Crown to obtain the necessary evidence to disprove a case that the accused had neither knowledge nor reason to suspect.

"Moreover, if the prosecution have first proved to the criminal standard that a person was (in fact) in possession of an imitation firearm which was (in fact) readily convertible into a lethal firearm, that is a scenario sufficiently out of the norm such that there is no obvious unfairness or unreasonableness in then requiring the possessor to, as it were, justify himself for possessing such an item.

"That the maximum sentence is (no more than) ten years is also at least consistent with a conclusion that the imposition of a legal reverse burden is, striking the balance, to be justified as a necessary, reasonable and proportionate derogation of the presumption of innocence. And that is our conclusion. Accordingly, the appeal on this ground fails." paras 40-44

6.17 ***Professional Standards for Health and Social Care v. Nursing and Midwifery Council*** **[2018] EWHC 70 (Admin)**

Where there is readily available evidence to support an allegation, a claim of 'no case to answer' should not succeed if the prosecutor has simply not bothered to amass it.

This recent case raises the issue from a different perspective.

A disciplinary body – the Nursing and Midwifery Council - operating under the National Health Service Reform and Health Care Professions Act 2002, refused to proceed against a midwife in a fitness to practise hearing, claiming that there was insufficient evidence against her and that there was therefore no case for her to answer. This was despite the fact that the nurse in question was under suspicion of causing multiple fractures to her own baby. She had been suspended by the NHS Trust; and a Family Court hearing had found that both parents were potential perpetrators of the injuries, and that they had both failed to protect the baby.

The decision of the NMC not proceed was held to be wrong in law. There was clearly a case for the nurse to answer. The reason they did not have sufficient evidence to proceed with the case was that they had simply made no effort to collect any!

6.18 **Unfair Contract Terms Act 1977**

Section 11: The "reasonableness" test.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

7 REVERSING THE EVIDENTIAL BURDEN

i. The Common Law Defences

7.1 The evidential burden is usually on the person bringing the case, which in criminal cases will always be the prosecution. However, there is sometimes also an evidential burden on the defendant in relation to specific defences, which will only be entertained by the court if there is some evidence of them.

7.2 This does not alter the evidential burden on the prosecution in establishing that a crime has been committed at all; nor does it alter the *legal burden* on the prosecution to prove the case against the defendant beyond all reasonable doubt, which may require them in practice to rebut the defendant's claim with further evidence.

ii. Self-Defence

7.3 In cases where the defences of self-defence or justification are raised the onus of proof of the guilt of the accused remains throughout on the prosecution. That does not mean that the prosecution must give evidence-in-chief to rebut a suggestion of self-defence before that issue is raised, or, indeed, need give any evidence on the subject at all.

7.4 If an issue relating to self-defence is to be left to the jury there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, but there is a difference between leading evidence which would enable a jury to find an issue in favour of the accused and in putting the onus upon him.

7.5 The jury must come to a verdict on the whole of the evidence that has been laid before them: if on a consideration of all the evidence the jury are left in doubt whether the killing or wounding may not have been in self-defence the proper verdict would be not guilty.

7.6 ***R. v. Lobell*** **[1957] 1 QB 547 (CA)**

The appellant, Harry Lazarus Lobell, was charged at Manchester Crown Court with wounding with intent to do grievous bodily harm. There had been bad blood and enmity between the appellant, who was a wholesale butcher and had a stall in a meat market, and the complainant, one Evans. There was evidence of threats which had been uttered by Evans against the appellant; he had on a previous occasion, with a knife in his hand, said he would kill Evans, who had retorted that if the appellant moved his arm, he would break it.

On the day of the wounding, it was said that Evans approached the appellant uttering threats, that the latter then threw a brick at Evans who, however, continued to advance towards him in a threatening manner, whereupon the appellant picked up a knife, which he said he had brought for his protection, and stabbed him. He then drove off to the police station and said that he had stabbed a man in self-defence.

At the trial the sole defence set up by the appellant was that in inflicting the wound he was acting in self-defence.

Jones J., summing up, directed the jury, and several times stressed, that it was for the defence to establish that plea to their satisfaction. The jury convicted the appellant and he appealed on the grounds that the judge's direction that the burden of proving this defence was on the accused was erroneous, and also that the judge did not direct the jury that the degree of proof required from the defence was of a less degree than that required from the prosecution.

The conviction was quashed.

The Court of Appeal held that a proper direction would have been to tell the jury that the burden of establishing guilt was on the prosecution throughout, but that they must also consider the evidence for the defence which might either convince them of the innocence of the accused or cause them to doubt, in which case he was entitled to an acquittal; or which might, as it sometimes did, strengthen the case for the prosecution; and that, as the court did not feel satisfied that if the correct direction had been given the jury would have been sure to have convicted, the conviction must be quashed.

"In the opinion of the court the cases of ***Woolmington v. Director of Public Prosecutions*** *and* ***Mancini v. Director of Public Prosecutions*** *establish that in murder or manslaughter the rule that the onus is on the prosecution permits of no exception except as to proof of insanity…*

"It must, however, be understood that maintaining the rule that the onus always remains on the prosecution does not mean that the Crown must give evidence-in-chief to rebut a suggestion of self-defence before that issue is raised, or indeed need give any evidence on the subject at all. If an issue relating to self-defence is to be left to the jury there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily no doubt such evidence would be given by the defence.

"But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him. The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If on a consideration of all the evidence the jury are left in doubt whether the killing or wounding may not have been in self-defence the proper verdict would be not guilty.

"A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may and sometimes does strengthen the case for the prosecution. It is perhaps a fine distinction to say that before a jury can find a particular issue in favour of an accused person he must give some evidence on which it can be found but none the less the onus remains on the prosecution; what it really amounts to is that if in the result the jury are left in doubt where the truth lies the verdict should be not guilty, and this is as true of an issue as to self-defence as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence.

"Had the judge in the present case gone on to say that it was not for the accused to establish his plea with the same degree of certainty as is necessary to establish a case for the prosecution it might have been that we should have had to consider whether this was a case for the application of the proviso. There was certainly here material on which a jury might have found self-defence. But that it was the duty of the accused to satisfy them on this point was on several occasions stressed in the summing-up and we do not feel by any means satisfied that if what we now hold was the correct direction had been given the jury would be sure to have convicted. For these reasons we quashed the conviction at the close of the argument." per Lord Goddard CJ

iii. Duress

7.7 ***R. v. Gill*** **[1963] 1 WLR 841 (Court of Criminal Appeal)**

Gill was a conspirator in a case involving the theft of a lorry and its load from his employer. His defence rested on a claim of duress, in that when he refused to cooperate with the other villains, they threatened physical violence both to him and to his wife, one of them flourishing a crowbar and another showing him a bottle of petrol, and in great fear for the safety of his wife and himself he obeyed their orders to accompany them to his employers' premises.

The judge directed the jury as follows:

"I must direct you that, in law, there is such a defence open to the defendant, but he has got to satisfy you that the threat was such and he was in such fear that he really lost all will of his own, that he was not acting of his own volition, of his own will… I have to remind you that the burden of proof remains throughout on the prosecution… If on the whole of the evidence, you are left in a real doubt about this you would find for the defendant and say 'not guilty.' If, on the whole of the evidence, you are satisfied that he did intend to do that act and his mind went with it, then he would be guilty."

Gill appealed on the basis that the judge had wrongly directed the jury that it was for the defence to establish that he was acting under duress and that it was therefore the defence rather than the prosecution which had the legal burden of proof.

The Court of Criminal Appeal held that there was an evidential burden on the defendant in relation to this defence, and that the judge made this clear in his direction.

"In our judgment, the law on this matter is to be found correctly stated in Dr. Glanville Williams' Criminal Law, 2nd ed. (1961), p. 762, in this way: "… although it is convenient to call duress a 'defence,' this does not mean that the ultimate (persuasive) burden of proving it is on the accused. … But the accused must raise the defence by sufficient evidence to go to the jury; in other words, the evidential burden is on him."

"The Crown are not called upon to anticipate such a defence and destroy it in advance. The defendant, either by the cross-examination of the prosecution witnesses or by evidence called on his behalf, or by a combination of the two, must place before the court such material as makes duress a live issue fit and proper to be left to the jury. But, once he has succeeded in doing this, it is then for the Crown to destroy that defence in such a manner as to leave in the jury's minds no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion." per Edmund Davies J.

E THE STANDARDS OF PROOF

8 BEYOND ALL REASONABLE DOUBT

8.1 ***Miller v. Minister of Pensions*** **[1947] 2 All ER 372**

"Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice." per Lord Denning

8.2 ***R. v. Yap Chuan Ching*** **(1976) 63 Cr. App. R. 7 (Court of Appeal)**

"Nevertheless, in most cases… judges would be well advised not to attempt any gloss upon what is meant by "sure" or what is meant by "reasonable doubt." … Experience in this Court has shown that such comments usually create difficulties. They are more likely to confuse than help… We point out and emphasise that if judges stopped trying to define that which is almost impossible to define there would be fewer appeals." Lawton LJ

8.3 ***Ferguson v. The Queen*** **[1979] 1 WLR 94 [Privy Council: Grenada]**

"The time-honoured formula is that the jury must be satisfied beyond reasonable doubt. As Dixon C.J. said in ***Dawson v. The Queen*** *(1961) 106 C.L.R. 1 , 18, attempts to substitute other expressions have never prospered. It is generally sufficient and safe to direct a jury that they must be satisfied beyond reasonable doubt so that they feel sure of the defendant's guilt. Nevertheless, other words will suffice, so long as the message is clear. In the present case, the jury could have been under no illusion. The importance of being sure was repeatedly emphasised. The judge thrust it home when, abandoning the language of the law for homely metaphors with which the jury would have been well familiar, he said that the prosecution had to satisfy them that the defendant's alibi could not "stand the light of day or hold water, or, if you prefer more dignified language, be entertained."* Lord Scarman p.98

8.4 ***R. v. Abdul Majid*** **[2009] EWCA Crim 2563**

"Any question from the jury dealing with the standard of proof is one that most judges dread. To have to define what is meant by "reasonable doubt" or what is meant by "being sure" requires an answer difficult to articulate and likely to confuse. No doubt that is why the Judicial Studies Board seeks to avoid it in the direction they give to judges." Moses LJ at para 12

9 THE BALANCE OF PROBABILITIES

9.1 ***Miller v. Minister of Pensions*** **[1947] 2 All ER 372**

"*[The degree of cogency required to discharge a burden in a civil case] is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not*." per Lord Denning

9.2 ***Re H (Minors) (Sexual Abuse: Standard of Proof)*** **[1996] AC 56**

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability… Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher." per Lord Nicholls

F CONFESSION EVIDENCE

10 INTRODUCTION TO CONFESSIONS

i. Introduction

10.1 Confession evidence can be vital to a prosecution. Indeed, it can (albeit rarely) be the only evidence leading to a conviction. However, there are various problems that can arise from confession evidence. Quite apart from the fact that a reported confession is technically hearsay, there is both the possibility that a confession may have been extracted from the defendant unlawfully; and that it might otherwise be unreliable, as people placed in extraordinary situations may well say extraordinary (and untrue) things, even if by doing so they implicated themselves in a crime.

Lam Chi-ming v. The Queen **[1991] 2 AC 212 (Privy Council)**

"Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody."

per Lord Griffiths at p.220

ii. The Judges' Rules (Historical Background)

10.2 One problem with confessions – and police evidence in general – was that different police authorities would use different methods of collecting evidence, which might well turn out to be inadmissible once it got to court.

10.3 Although the first professional police force was established in Glasgow in 1800, it was not until Robert Peel's Metropolitan Police Act 1829 that there was established a full-time, professional and centrally-organised police force for the greater London area known as the Metropolitan Police. Legislation in the 1830s introduced policing in boroughs and many counties and, in the 1850s, policing was established nationally.

10.4 By the end of the 19th century, a wide divergence in practice had arisen among the different police forces, despite the best efforts of such people as Sir Howard Vincent, the first Director of Criminal Investigation in 1878, who published an informal guide to proper police behaviour called the *Police Code and Manual of Criminal Law*.

10.5 In 1912, the Home Secretary requested the judges of the King's Bench to give English police forces guidance on the procedures that they should follow in detaining and questioning suspects, which they did by way of publishing 'The Judges' Rules'. These were not rules of law, but rather rules of practice for the guidance of the police, setting out the kinds of conduct that could cause a judge to exercise discretion to exclude evidence, in the interests of a fair trial.

10.6 ***R v. Voisin*** **[1918] 1 KB 531**

The appellant, Louis Marie Joseph Voisin, a Frenchman, was tried at the Central Criminal Court before Darling J., for the murder of a woman named Emilienne Gerard.

The trunk of the body of the murdered woman had been found in a parcel in Regent Square, a piece of paper with the words "Bladie Belgiam" upon it being also found in the parcel. The police, in the course of their investigations, requested the appellant to go to Bow Street Police Station and account for his movements at the supposed time of the murder. He made a statement which was taken down in writing.

He was afterwards asked whether he had any objection to write the words "Bloody Belgian." He said, "Not at all," and then wrote the words "Bladie Belgiam." The appellant was not cautioned by the police before he made the statement or wrote the words. At that time the head and hands of the murdered

woman had not been discovered and the trunk had not been identified, and the police, although they were detaining the appellant in custody for inquiries, had not decided to charge him with the crime.

It was contended at the trial that the writing with the words "Bladie Belgiam" upon it was inadmissible in evidence on the ground that it was obtained by the police without having first cautioned the appellant and while he was in custody, the writing, however, was admitted as evidence. The jury found the appellant guilty of murder, and he was sentenced to death.

On appeal, the Court found that the evidence was not obtained in a way which conflicted with the Judges' Rules, and was therefore admissible.

"It cannot be said as a matter of law that the absence of a caution makes the statement inadmissible; it may tend to show that the person was not upon his guard as to the importance of what he was saying or as to its bearing upon some charge of which he has not been informed. In this case the prisoner wrote these words quite voluntarily. The mere fact that the words were written at the request of police officers, or that he was being detained at Bow Street, does not make the writing inadmissible in evidence. Those facts do not tend to change the character of handwriting, nor do they explain the resemblance between his handwriting and that upon the label, or account for the same misspellings occurring in both. There was nothing in the nature of a "trap" or of the "manufacture of evidence"; the identity of the deceased woman had not at this moment been established, and the police, though they were detaining the prisoner in custody for inquiries, had not then decided to charge him with this crime; indeed, if the writing had turned out other than it did and other circumstances had not subsequently transpired, it is certain that he, like others who were similarly detained, would have been discharged. It is desirable in the interests of the community that investigations into crime should not be cramped. The Court is of opinion that they would be most unduly cramped if it were to be held that a writing voluntarily made under the circumstances here proved was inadmissible in evidence…

"It may be, and often is, a ground for the judge in his discretion excluding the evidence; but he should do so only if he thinks the statement was not a voluntary one in the sense above mentioned, or was an unguarded answer made under circumstances that rendered it unreliable, or unfair for some reason to be allowed in evidence against the prisoner. Even if we disagreed with the mode in which the judge had in this case exercised his discretion, which we do not, we should not be entitled to overrule his decision on appeal. This was evidence admissible in law, and it could not be fairly inferred from the other circumstances that it was not voluntary.

"In 1912 the judges, at the request of the Home Secretary, drew up some rules as guides for police officers. These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial."

per A.T. Lawrence J.

10.7 These rules were finally replaced by the statutory Codes in the Police and Criminal Evidence Act 1984, though PACE s.82 specifically preserves certain common law protections.

10.8 If the defendant has made a confession, there are four tests given in PACE 1984 under which it might be excluded as evidence.

1. The oppression test: s.76 (2) (a)
2. The reliability test: s.76 (2) (b)
3. The fairness test: s.78
4. The common law test: s.82 (3)

10.9 In considering whether the confession has been properly obtained, one should have in mind Code C, as promulgated under the authority of PACE. This is the Code of Practice for the detention, treatment and questioning of persons by Police Officers, as last revised in February 2017.

11 THE DEFINITION OF A CONFESSION

i. What is a Confession?

11.1 **Murphy on Evidence**

"An adverse admission relevant to the issue of guilt in a criminal case."

11.2 **The Oxford English Dictionary**

"Exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc.; the imposition of unreasonable or unjust burdens."

11.3 **Police and Criminal Evidence Act 1984**

s.82 (1) "confession", includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise.

11.4 A confession need not be a full admission of guilt, just a statement with relevance to the issue of guilt, which is adverse to the maker. In other words, it may help to prove guilt rather than being a complete admission of guilt. It can be anything which would prejudice the defendant's case.

11.5 A statement which **prejudices** the defendant in a criminal case is called 'inculpatory'

11.6 A statement which **favours** the defendant in a criminal case is called 'exculpatory'

11.7 A statement will only count as a confession if it was adverse to the defendant at the time s/he made the statement. If it becomes adverse retrospectively (e.g. because s/he changes the story) the original statement does not become a confession.

11.8 ***R. v. Hasan*** **[2005] 2 AC 467**

Aytach Hasan had worked as a driver and minder for Claire Taeger, who ran an escort agency and was involved in prostitution. In about July or August 1999, according to the defendant, Sullivan became Taeger's boyfriend and also her minder in connection with her prostitution business. He had, the defendant said, the reputation of being a violent man and a drug dealer.

On 29 August 1999 a man living in Croydon telephoned Taeger's agency asking for the services of a prostitute. Hasan went to the address with a prostitute. But the client had changed his mind and claimed that he had not made a telephone call. Hasan insisted that a £50 cancellation fee be paid, and forced his way into the house, producing a knife and demanding payment. The client went upstairs and opened a safe, whereupon the defendant took some £4,000 from it and ran from the house. This incident founded the first count of aggravated burglary in the indictment later preferred against the defendant. But his account of the incident was quite different. He said that he had been given the £50 fee without any threat and had taken nothing from the safe.

On 23 January 2000, Hasan forced his way into the same house, armed with a knife, and attempted to steal the contents of the safe, He confessed to this, but claimed that he had acted under duress exerted by Sullivan, who had fortified his reputation for violence by talking of three murders he had recently committed.

On 26 June 2000 Hasan had an "off the record" interview with police officers who were involved in a separate murder inquiry. The reason for the confidential interview was that the defendant said that he was in fear of Sullivan. The police agreed not to question the defendant about the burglaries. He was not cautioned. There was no tape recording. The police prepared a report of the interview. In the context of the murder inquiry, the defendant said that Sullivan only told him about the murder in late February or early March 2000. When made the report of the confidential interview contained nothing adverse to the defendant's interest in respect of the second burglary. It was either entirely exculpatory or entirely neutral in effect.

However, there were important differences between what the defendant had said during this confidential interview and what he was to say at his trial. In the confidential interview the defendant did not say that he had taken part in the second burglary because of threats made by Sullivan against

himself and his family. In accordance with the police report of the confidential interview the threats had not been made until late February or early March 2000, that is after the second burglary.

In retrospect then, the confidential interview about the murder became adverse to Hasan's case, as it was inconsistent with the defence of duress he raised at the burglary trial. Hasan claimed that the earlier interview was therefore a confession, which could not be admitted in evidence as it had not been properly obtained. Whilst the Court of Appeal agreed with him, the House of Lords did not. To fulfil the definition of an out-of-court confession, the statement must be wholly or partly adverse to the maker at the time it was made.

"It is wholly implausible that the draftsman would have made express reference only to wholly or partly adverse statements if he also had in mind covering under the definition of "confession" wholly exculpatory statements…The plain meaning of the statute is against such a strange interpretation. And it is inconceivable, on policy grounds, that the legislature would have introduced such a fundamental change in the law by leaving the question whether an exculpatory statement is a confession to depend on developments at trial…

"Properly construed section 76(1), read with section 82(1), requires the court to interpret a statement in the light of the circumstances when it was made. A purely exculpatory statement (e g "I was not there") is not within the scope of section 76(1). It is not a confession within the meaning of section 76. The safeguards of section 76 are not applicable. But the safeguards of section 78 are available."

per Lord Steyn at paras 56-58

12 CONFESSIONS OBTAINED BY OPPRESSION

i. Definition of Oppression

12.1 According to ***R. v. Fulling*** **[1987] QB 426**, 'oppression' is to be given its normal dictionary meaning.

12.2 **oppression (noun)** *prolonged cruel or unjust treatment or exercise of authority.*
Synonyms: persecution, abuse, maltreatment, tyranny, despotism, repression, suppression, subjection, subjugation, exploitation.

12.3 **PACE 1984, s.76 (8)**

In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).

12.4 It does not include the ordinary 'oppression' or distress of simply being under arrest, as that would render virtually all confessions inadmissible. There would normally have to be some extra act of bad will by the interrogator.

12.5 ***R. v. Fulling*** **[1987] QB 426**

Ruth Fulling was arrested as part of a large investigation into insurance fraud. She was put into a police cell next to a woman called Christine Judge, who it was revealed to her was having an affair with Ruth's lover. Ruth confessed, but later claimed that this was only to get away from being near the cell where Christine was, and that her confession was therefore the result of oppression.

The Court of Appeal held that the word oppression meant something more than just the inherent oppression of being in custody, and was to be given its ordinary dictionary meaning of exercise of authority or power in a burdensome, harsh, or wrongful manner, unjust or cruel treatment of subjects or inferiors, or the imposition of unreasonable or unjust burdens; and that circumstances could hardly be envisaged in which such oppression did not entail some impropriety by the interrogator.

On 6 August 1986 in the Crown Court at Leeds, Ruth Susan Fulling, was convicted by a majority of 10 to 2 of obtaining property by deception.

In September 1981 the appellant claimed some £5,665 from her insurers in respect of what she claimed was a burglary at her flat in Leeds. The insurance company in July 1982 paid her £5,212 in settlement of the claim.

Many months later a man called Turnpenny, an acknowledged criminal, gave to the police a mass of information about the activities of other criminals, which resulted in a large number of people being arrested, among them being the appellant. Turnpenny gave evidence that the appellant had told him that her "burglary" was bogus; that a man called Maddon had committed it; that she knew the whereabouts of the stolen property. She gave him to understand that the idea of the bogus burglary had been initiated by one Drewery, with whom the appellant had been living and with whom she was infatuated.

As a result of this information the appellant was arrested in the early hours of Friday 12 July 1985. Drewery was arrested at the same time. She was interviewed twice on that day, but exercised her right to say nothing despite persistent questioning by the police. She was interviewed again on the following day, Saturday. The interview was split into two, with a break in between, according to the police of 50 minutes, according to her of about 5 or 10 minutes.

The police witnesses described how, after initially refusing to answer questions, her attitude started to change. One of the officers, Detective Sergeant Beech, said: "You've obviously got a lot on your mind, are you finding it difficult?" "Yes." "Would I be right in saying that you want to talk about this but every bone in your body is telling you you shouldn't?" "Something like that" was the reply. Then came the break already described.

When the interview was resumed, in answer to questions from the officer she admitted a number of offences. Amongst them was the setting up of the bogus burglary: "I approached a man in a pub because I was short of money and asked him if he would break in for me." She admitted obtaining the money from her insurers. She said that she had spent some of it on a holiday for herself and Drewery. She expressed her sorrow at having committed the offences and said she felt relieved that she had confessed. She sought, it should be added, to exculpate Drewery.

She appealed against conviction on the ground that the judge erred in failing to exclude a confession on the basis that it might have been obtained by oppression within the meaning of section 76(2)(a) of the Police and Criminal Evidence Act 1984 . She claimed that her reason for making the confession was this. After the break in the final interview one of the police officers, Detective Constable Holliday, told her that Drewery, her lover, had been having for the last three years or so an affair with a woman called Christine Judge. Now Christine Judge was one of the many people who had been arrested as a result of Turnpenny's disclosures. She was in the next cell to the appellant and, said the appellant, Detective Constable Holliday told her so. These revelations, said the appellant, so distressed her that she "just couldn't stand being in the cells any longer."

Then later in her evidence she said: "As soon as the matter about Christine came out, Detective Constable Holliday left the room and my head was swimming. I felt numb and after a while I said to Detective Sergeant Beech, 'Is it true?' and he said 'Ronnie shouldn't have said that, he gets a bit carried away. Look, Ruth, why don't you make a statement?'"

The Court of Appeal did not think that this amounted to oppression.

“This in turn leads us to believe that "oppression" in section 76(2)(a) should be given its ordinary dictionary meaning. The Oxford English Dictionary as its third definition of the word runs as follows: "Exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc.; the imposition of unreasonable or unjust burdens." One of the quotations given under that paragraph runs as follows: "There is not a word in our language which expresses more detestable wickedness than oppression."

“We find it hard to envisage any circumstances in which such oppression would not entail some impropriety on the part of the interrogator. We do not think that the judge was wrong in using that test. What, however, is abundantly clear is that a confession may be invalidated under section 76(2)(b) where there is no suspicion of impropriety. No reliance was placed on the words of section 76(2)(b) either before the judge at trial or before this court. Even if there had been such reliance, we do not consider that the policeman's remark was likely to make unreliable any confession of the appellant's own criminal activities, and she expressly exonerated - or tried to exonerate - her unfaithful lover.

“In those circumstances, in the judgment of this court, the judge was correct to reject the submission made to him under section 76 of the Act of 1984. The appeal is accordingly dismissed.”

per Edmund Davies LJ

ii. Oppression by Words

12.6 Oppression can be by words as well as deeds.

R. v Anthony Paris; R. v Yusuf Abdullahi; R. v Stephen Wayne Miller **(1993) 97 Cr. App. R. 99**

It is oppressive for interviewing officers to shout, bully and hector the suspect in interview. An interview obtained in oppressive circumstances is unreliable and not admissible. Miller was charged, with four others, with the murder of a prostitute. The main evidence against M was his confession evidence which was ruled admissible at trial. M, and two other defendants implicated by M's confession, were later convicted of murder. All three appealed on the ground that the confession had been obtained in oppressive circumstances which rendered it unreliable and therefore inadmissible under the Police and Criminal Evidence Act 1984 s.76(2) .

Held, allowing the appeals, that the tenor and length of the interviews was oppressive for someone of normal mental capacity and M had been adjudged to be on the borderline of mental handicap. The interviewing officers could not have acted in a more hostile and intimidating manner. Interviewing for 13 hours over 19 tapes, they had made it clear to M that they would continue to question him until they "got it right". In these circumstances the confession should not have been admitted. The jury might have been prejudiced by that confession evidence against the other appellants and so those convictions were also unsafe and unsatisfactory and would also be quashed.

From the judgment of Lord Taylor, CJ

Miller's case

Against Miller the Crown relied essentially on three heads of evidence: (1) Vilday and Psaila, despite the extent to which they were discredited; (2) Miller's interviews, (3) His admissions to Mrs. Sidorak and Miss Taylor, who visited him in prison. Of these, the interviews were crucially important, not only in Miller's case but, as we shall indicate, in the cases of all three appellants.

Miller was arrested on December 7 in London. He was taken to Cardiff and over five days, between December 7 and 11, he was interviewed for some 13 hours. All of the interviews were tape-recorded, and in total there were 19 tapes. Although a solicitor was engaged from the start, he was not allowed to be present during the first two interviews on December 7. From the third interview on December 8 onwards he was present. On tapes 1, 2, 6 and 7, the interviewing officers were Detective Constables Greenwood and Seaford. On all the other tapes the interviewing officers were Detective Constables Evans and Murray, save for 16 and 17 when Detective Constable Toogood replaced Detective Constable Murray.

In summary, Miller denied both participation and presence at the scene on tapes 1 to 7. On 8 and 9 he began to accept he was present. Thereafter he was pressed to say who had stabbed Lynette and eventually to admit that he did. Having denied involvement well over 300 times, he was finally persuaded to make three admissions on which the prosecution particularly relied, in addition to his admission to being present. The first of those was on tape 18, where page 7 of the transcript records him as saying “Paris went crazy so I started stabbing.” Miller was speaking very fast at that point and the word “I” is by no means clear. It was certainly not taken up by the officers at the time as an admission that he had stabbed Lynette.

Secondly, towards the end of tape 18 the officers put it to Miller that he was drugged and may have stabbed Lynette without knowing what he was doing. Thus, at page 81 of the transcript Detective Constable Murray said: “O.K., O.K. at least we can now say we've got it right, because even if you can't say yes I did, or no I didn't. You were so blocked up you didn't know what you were doing.”

At page 84 Miller said, “That's what I say, I don't know. I might have done, I might have done.” Thirdly, on tape 19 at page 52 of the transcript the appellant said after a period of pressure, “I just stabbed her, not stabbed her just fucking thumped her in her face I mean.”

Mr. Mansfield, who did not appear in the court below, submits that the interviews were oppressive and the whole course of questioning was such as to render Miller's admissions unreliable. He relies on section 76(2) of the Police and Criminal Evidence Act 1984 , which provides as follows: “(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(*a*) by oppression of the person who made it; or (*b*) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

Three points on that section require emphasis. First, the issue having been raised by the defence, the burden of proving beyond reasonable doubt that neither (2*)(*a) nor (2)(b) applied was on the Crown. Secondly, what matters is how the confession was obtained, not whether or not it may have been true. Thirdly, unless the prosecution discharged the burden of proof, the judge was bound as a matter of law to exclude the admissions. His decision was not discretionary…

We have read the transcripts of the tapes and have heard a number of them played in open court. It became clear that the two pairs of officers employed different methods. Greenwood and Seaford were tough and confrontational. Evans and Murray were milder in manner, aiming to gain the appellant's confidence and persuade him to accept their version of the facts.

We are bound to say that on hearing tape 7, each member of this Court was horrified. Miller was bullied and hectored. The officers, particularly Detective Constable Greenwood, were not questioning him so much as shouting at him what they wanted him to say. Short of physical violence, it is hard to conceive of a more hostile and intimidating approach by officers to a suspect. It is impossible to convey on the printed page the pace, force and menace of the officer's delivery, but a short passage may give something of the flavour:

Stephen Wayne Miller: "I wasn't there."
D. C. Greenwood: "How you can ever …?"
Stephen Wayne Miller: "I wasn't there."
D. C. Greenwood: "How you … I just don't know how you can sit there, I …"
Stephen Wayne Miller: "I wasn't …"
D. C. Greenwood: "Really don't."
Stephen Wayne Miller: "I was not there; I was not there."
D. C. Greenwood: "Seeing that girl, your girlfriend, in that room that night like she was. I just don't know how you can sit there and say it."
Stephen Wayne Miller: "I wasn't there."
D. C. Greenwood: "You were there that night."
Stephen Wayne Miller: "I was not there."
D. C. Greenwood: "Together with all the others, you were there that night."
Stephen Wayne Miller: "I was not there. I'll tell you already …"
D. C. Greenwood: "And you sit there and say that."
Stephen Wayne Miller: "They can lock me up for 50 billion years, I said I was not there."
D. C. Greenwood: "'Cause you don't wanna be there."
Stephen Wayne Miller: "I was not there."
D. C. Greenwood: "You don't wanna be there because if …"
Stephen Wayne Miller: "I was not there."
D. C. Greenwood: "As soon as you say that you're there you know you're involved."
Stephen Wayne Miller: "I was not there."
D. C. Greenwood: "You know you were involved in it."
Stephen Wayne Miller: "I was not involved and I wasn't there."
D. C. Greenwood: "Yes you were there."
Stephen Wayne Miller: "I was not there."
D. C. Greenwood: "You were there, that's why Leanne is come up now …"
Stephen Wayne Miller: "No."
D. C. Greenwood: "'Cause her conscience is …"
Stephen Wayne Miller: "I was not there."
D. C. Greenwood: "She can't sleep at night …"
Stephen Wayne Miller: "No. I was not there."
D. C. Greenwood: "To say you were there that night …"
Stephen Wayne Miller: "I was not there."
D. C. Greenwood: "Looking over her body seeing what she was like …"
Stephen Wayne Miller: "I was not there."
D. C. Greenwood: "With her head like she had and you have got the audacity to sit there and say nothing at all about it."
Stephen Wayne Miller: "I was not there."
D. C. Greenwood: "You know damn well you were there."

Stephen Wayne Miller: “I was not there.”

and so on for many pages. We have no doubt that this was oppression within the meaning of section 76(2).

iii. The Characteristics of the Defendant

12.7 The characteristics of the individual defendant will be considered, as what may be oppressive to a scared, vulnerable person would not necessarily be oppressive to a hardened criminal.

12.8 ***R. v. Heibner*** **[2014] EWCA Crim 102**

Heibner had been convicted of a contract killing in 1978. He had confessed to being the look-out, but not the killer.

37 years later he appealed on the grounds that his confession was based on oppression. *Inter alia*, he claimed that his confession had been made after a 50-hour detention and he had not been offered a solicitor.

It was held that even if all that were true, as he was already a hardened criminal by then with 15 years’ worth of convictions, these defects in procedure would not have unduly bothered him to the point of feeling oppressed.

“Heibner was held for 42 hours before interviews began. Although the Judges' Rules , which then governed the topic, did not prohibit detention for such a period, under the subsequently enacted Police and Criminal Evidence Act 1984 (“PACE”) the approval of a Superintendent would be required for anything exceeding 36 hours. No explanation was provided for the delay. Even leaving aside Heibner's complaints about sleeping, approaching 50 hours detention by the time exhibit 32 was written is likely to be relevant to its reliability.

“In our view it is important to see this submission in context. That Heibner had been at the police station for a considerable period by the time of his statement was explored both on the voir dire and in front of the Jury. Heibner had previous convictions for serious offences, including armed robbery. He was no stranger to police stations or to the routine of arrest and interview. Custody for him was unlikely to have been as challenging as for a detainee unfamiliar with the system or familiar only with criminal allegations lower on the ladder of seriousness. We do not attach importance to this complaint.”
per Rafferty LJ (Lady Justice Rafferty) at paras 31 and 32

iv. The Effect of Oppression

12.9 ***A v. Secretary of State for the Home Department (no.2)*** **[2006] 2 AC 221**

“Evidence of a suspect or witness which had been obtained by torture had long been regarded as inherently unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles on which courts should administer justice, and that, in consequence, such evidence might not lawfully be admitted against a party to proceedings in a United Kingdom court, irrespective of where, by whom or on whose authority the torture had been inflicted.” per Lord Bingham

12.10 **Police and Criminal Evidence Act 1984**

s. 76 Confessions

(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained —

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court **beyond reasonable doubt** that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

v. The Effect of the Human Rights Act 1998

12.11 The Human Rights Act 1998 has had an impact on the interpretation of PACE s.76, because of ECHR Article 6, which states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

12.12 ***R. v. Mushtaq*** **[2005] 1 WLR 1513**

Ashfaq Mushtaq was on trial for conspiracy to defraud. He claimed that the admission he made to the police was a confession as a result of oppression and should be excluded as evidence.

Following a *voir dire*, the judge allowed the evidence. In his summing up the judge directed the jury that if they were not sure, for whatever reason, that the confession was true, they must disregard it, but that if, on the other hand, they were sure that it was true, they could rely on it even if it had or might have been made as a result of oppression or other improper circumstances.

The jury convicted the defendant. He appealed on the grounds that the judge should have directed the jury to disregard the confession if they found it to have been obtained by oppression and that the judge's direction was incompatible with the defendant's right against self-incrimination under article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998

The House of Lords held that the judge had given the wrong direction to the jury (but they upheld the conviction, as it was not unsafe).

The judge's direction that the jury could take into account a confession which they considered was or might have been obtained by oppression or other improper means was an invitation to the jury to act in a way that was incompatible with Mushtaq 's right against self-incrimination implied into Art.6(1).

Where a judge has ruled under the Police and Criminal Evidence Act 1984 s.76(2) that evidence of an alleged confession had *not* been obtained by oppression or other improper means and had allowed it to be given in evidence, he was required to direct the jury that, if they concluded that the alleged confession might have been so obtained, they must disregard it.

Thus, if there is evidence that a confession might have been obtained by oppression (or any other of the excluding reasons in PACE s.76) then, even if the judge does not exclude the evidence, the jury should be directed to disregard the confession if they think that the way it was obtained was in violation of s.76.

13 UNRELIABLE CONFESSIONS

i. Police and Criminal Evidence Act 1984, s.76

13.1 **Police and Criminal Evidence Act 1984**

s. 76 Confessions

(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court **beyond reasonable doubt** that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

13.2 There are conflicting authorities on precisely what 'anything said or done' means.

"...anything said or done..." is usually taken to mean OTHERWISE than by the defendant himself.

In ***R. v. Goldenberg*** **(1989) 88 Cr App R 285** the defendant was suffering from drug withdrawal symptoms when he confessed, but this was taken to be self-induced and not covered by s.76.

However...

In ***R v. Walker*** **[1998] Crim LR 211** the Court of Appeal considered the fact that the defendant was high on cocaine when he confessed *was* a relevant factor under s.76.

ii. Tainting later confessions

13.3 Where an initial confession was unreliable (e.g. because a vulnerable defendant was refused legal advice), subsequent confessions may also be unreliable, even if the interview is properly conducted, if the trauma of the first interview still has a causative effect on the second.

13.4 ***R. v Cherie McGovern*** **(1991) 92 Cr. App. R. 228**

The appellant, aged 19, six months' pregnant and of limited intelligence, was arrested on a charge of murder the day after events leading to the death of the victim occurred. The appellant requested access to a solicitor pursuant to section 58 of the Police and Criminal Evidence Act 1984 , but was refused. The Crown subsequently admitted the unlawfulness of that refusal. The appellant was physically ill, emotionally distressed and unable to understand the caution until it was explained in simple language. During the first interview, in the absence of a solicitor, she confessed to having taken part in the homicide. No contemporaneous note was made of that interview, nor was the record later produced, read to or signed by the appellant as required by C. 11.3 and C. 11.6 of the Code of Practice. The following day she was interviewed again in the presence of a solicitor, when she again made admissions in a more coherent form.

At her trial on a charge of murder with other defendants, a submission that the confession evidence against the appellant was inadmissible was rejected by the trial judge. The appellant was convicted of manslaughter by reason of diminished responsibility.

On appeal, it being contended that the confession evidence should have been excluded:

Held, that the confession in the first interview was made in consequence of the appellant being denied access to a solicitor and was, in the circumstances likely to be unreliable, notwithstanding that it was later admitted to be true, which was not a relevant factor under section 76(2) of the Police and Criminal Evidence Act 1984 , and ought not to have been admitted. The first interview, made in breach of section 58 of the 1984 Act and the Code of Practice aforesaid, similarly tainted the second interview. As without that evidence there was no reliable evidence against the appellant the appeal would be allowed and the conviction quashed.

13.5 ***R. v. Barry*** **[1991] 95 Cr App R 384**

This case offers guidelines by the Court of Appeal to the application of the Reliability Test.

The appellant was charged with conspiracy to steal with two co-accused. The prosecution alleged that they had devised a scheme to defraud a Swiss bank of £30 million. The appellant was arrested at 8.10 a.m. on June 13, 1989 and taken to a police station.

At the first interview at 13.57 that day he made no admissions. He was anxious to obtain bail because he had custody of his nine-year-old son and did not want custody to be transferred to his estranged wife. At 17.26 on that day he was charged. The next morning, he was advised by counsel to say nothing if interviewed further. Bail was refused by the magistrates.

On June 14 three interviews were conducted with the appellant in breach of paragraph 16.8 of Code C in that they were neither recorded, nor any note taken of them. During those interviews the appellant offered evidence in return for assistance in obtaining bail.

Subsequently a police officer wrote to the Crown Court judge setting out the appellant's agreement, if granted bail, to arrange a meeting with a fellow conspirator with a view to his being arrested.

At 14.00 on June 14 the appellant made a full confession in a tape-recorded interview, although he was not asked whether he wanted his solicitor to be present as required by Code C.6.6. The unrecorded interviews did not come to light until halfway through the trial.

The appellant invited the trial judge to exclude the evidence of the last interview under section 76(2). The judge refused to do so on the basis that the confession had not been induced by an offer of bail. He was convicted and appealed.

Held, allowing the appeal, that the trial judge had given far too little weight to the numerous breaches of Code C which resulted in crucial evidence going unrecorded and only being revealed halfway through the trial. The evidence should not have been admitted.

The Court of Appeal laid out the correct approach to questions of unreliability in a three-point test:

1. Identify the relevant thing said or done, which requires the trial judge to take into account at least everything said and done by the police.

2. Ask whether what was said and done was likely in the circumstances to render unreliable a confession made in consequence. The test is objective taking into account all the circumstances.

3. Ask whether the prosecution have proved beyond reasonable doubt that the confession was not obtained in consequence of the thing said and done, which is a question of fact to be approached in a common-sense way.

14 UNFAIR CONFESSIONS

i. Police and Criminal Evidence Act 1984, s.78

14.1 **Police and Criminal Evidence Act 1984**

s. 78 Exclusion of unfair evidence

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

14.2 The most common ground of unfairness is a breach of Code C (see Part 15 below), especially if accompanied by bad faith on the part of the police.

14.3 It is not enough that there has been such a breach: it must also have such an adverse effect on the fairness of the proceedings that justice requires its exclusion.

ii. R. v. Mason

14.4 ***R. v. Mason*** **[1988] 1 WLR 139**

Mason was suspected of involvement with an arson attack. The police falsely told him that his fingerprints had been found at the scene, and he confessed. It was held that the confession should have been excluded because of the deliberate and serious malpractice by the police.

From the judgment of Watkins LJ

"On 1 July 1986 a motor car belonging to a Mr. Askew was set on fire. It was very badly damaged. The cost of repairing the damage was something in the region of £1000. It was obvious to those who later went on to inspect the damage that the fire had been caused by an inflammable liquid thrown against the car and ignited. Before that incident there had been bad feeling between the appellant, who is 20 years of age, and Mr. Askew. Mr. Askew has a daughter who is 18 years of age. The appellant and this young lady had been going out together. She became pregnant by him. She was not willing to bear his child. She decided to have an abortion and she did. She also broke off her relationship with the appellant. He did not take that at all well. His erstwhile girlfriend's father and mother did not look upon what had happened with any great favour either; nor did they feel any pleasure in seeing the appellant any more. They began to receive midnight telephone calls. Upon each occasion they answered the telephone, whoever was at the other end put the receiver down. They suspected the appellant of making those calls. It may be that their suspicions were well-founded.

"At two o'clock in the morning of 1 July 1986 Mr. Askew while in bed was woken up by a screech of tyres on the road outside his house. He thought no more of it then and went back to sleep, but a few minutes later he was again woken up, this time it was by a telephone call from a neighbour. As a result of that he ran to a window and saw that his motor car, which was parked outside, was on fire. There was nobody near the car. He had a foam fire extinguisher handy and with that he succeeded in putting out the fire. There were other parked cars nearby. If Mr. Askew had not succeeded in putting out the fire, it may well have been that the petrol in the car would have ignited and the fire spread to the other cars.

"When the police came to the scene there was a lot of broken glass, as they discovered, about the place near the car. It was soon found that an inflammable liquid had been used, probably a combination of petrol and paint thinners. About 12 hours or so later the police paid a visit to the appellant. He denied having been involved in setting fire to the car.

"On 10 July he was arrested. Be it noted that upon arrest the police had in their possession no evidence at all to associate him with the cause of the fire. Before arrest one or more police officers decided to invent evidence and to acquaint the appellant of that so-called evidence as though it was genuinely

possessed. What they decided to do was to tell the appellant that a fingerprint of his had been found in a very telling place. As to that Detective Constable Gunton said: "Detective Constable Walton and I set out deliberately to make the defendant believe we had a fingerprint on some of the glass fragments from the bottle that was used to perpetrate this crime. I agreed with the detective constable to this play-acting and it was a trick. The bottle, or the fragments of it, had not even been sent for fingerprint testing at that stage. We set about 'conning' the defendant. We had a suspicion, but only suspicion against him and we realised that we needed more proof … I felt the only way to get the truth from him was to do this..."

"The law is, as I have already said, that a trial judge has a discretion to be exercised of course upon right principles to reject admissible evidence in the interests of a defendant having a fair trial. The judge in the present case appreciated that, as the quotation from his ruling shows. So, the only question to be answered by this court is whether, having regard to the way the police behaved, the judge exercised that discretion correctly. In our judgment he did not. He omitted a vital factor from his consideration, namely, the deceit practised upon the appellant's solicitor. If he had included that in his consideration of the matter, we have not the slightest doubt that he would have been driven to an opposite conclusion, namely, that the confession be ruled out and the Jury not permitted therefore to hear of it. If that had been done, an acquittal would have followed for there was no other evidence in the possession of the prosecution.

"For those reasons we have no alternative but to quash this conviction.

"Before parting with this case, despite what I have said about the role of the court in relation to disciplining the police, we think we ought to say that we hope never again to hear of deceit such as this being practised upon an accused person, and more particularly possibly on a solicitor whose duty it is to advise him unfettered by false information from the police."

15 THE COMMON LAW TEST

i. Police and Criminal Evidence Act 1984, s.82

15.1 **Police and Criminal Evidence Act 1984**

s.82 Interpretation

(3) Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.

15.2 In other words, judges retain their common law discretion to exclude evidence – or to direct the jury to ignore it.

G ACCESS TO LEGAL ADVICE

16 CODE C, PACE s.58 AND ARTICLE 6

i. Introduction

16.1 The rules relating to access to legal advice are laid down in:

1. Code C para 6;
2. PACE s.58; and
3. ECHR Article 6

ii. Code C

16.2 **CODE C**

6. Right to legal advice

6.1 Unless Annex B applies, all detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available.

6.4 No police officer should, at any time, do or say anything with the intention of dissuading any person who is entitled to legal advice in accordance with this Code, whether or not they have been arrested and are detained, from obtaining legal advice.

6.6 A detainee who wants legal advice may not be interviewed or continue to be interviewed until they have received such advice unless Annex B applies

16.3 **CODE C: Annex B**

1. The exercise of the rights in Section 5 or Section 6, or both, may be delayed if the person is in police detention... in connection with an indictable offence, has not yet been charged with an offence and an officer of superintendent rank or above... has reasonable grounds for believing their exercise will:

(i) lead to interference with, or harm to, evidence connected with an indictable offence; or interference with, or physical harm to, other people; or

(ii) lead to alerting other people suspected of having committed an indictable offence but not yet arrested for it; or

(iii) hinder the recovery of property obtained in consequence of the commission of such an offence.

iii. Police and Criminal Evidence Act 1984, s.58

16.4 **Police and Criminal Evidence Act 1984**

s.58 Access to legal advice

(1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.

(2) Subject to subsection (3) below, a request under subsection (1) above and the time at which it was made shall be recorded in the custody record.

(3) Such a request need not be recorded in the custody record of a person who makes it at a time while he is at a court after being charged with an offence.

(4) If a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable except to the extent that delay is permitted by this section.

(5) In any case he must be permitted to consult a solicitor within 36 hours from the relevant time, as defined in section 41(2) above.

(6) Delay in compliance with a request is only permitted—

(a in the case of a person who is in police detention for an indictable offence; and

(b) if an officer of at least the rank of superintendent authorises it.

(7) An officer may give an authorisation under subsection (6) above orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.

(8) Subject to sub-section (8A) below, an officer may only authorise delay where he has reasonable grounds for believing that the exercise of the right conferred by subsection (1) above at the time when the person detained desires to exercise it—

(a) will lead to interference with or harm to evidence connected with an indictable offence or interference with or physical injury to other persons; or

(b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or

(c) will hinder the recovery of any property obtained as a result of such an offence.

(8A) An officer may also authorise delay where he has reasonable grounds for believing that—

(a) the person detained for the indictable offence has benefited from his criminal conduct, and

(b) the recovery of the value of the property constituting the benefit will be hindered by the exercise of the right conferred by subsection (1) above.

(8B) For the purposes of subsection (8A) above the question whether a person has benefited from his criminal conduct is to be decided in accordance with Part 2 of the Proceeds of Crime Act 2002.

(9) If delay is authorised—

(a) the detained person shall be told the reasons for it; and

(b) the reason shall be noted on his custody record.

(10) The duties imposed by subsection (9) above shall be performed as soon as is practicable.

(11) There may be no further delay in permitting the exercise of the right conferred by subsection (1) above once the reason for authorising delay ceases to subsist.

(12) Nothing in this section applies to a person arrested or detained under the terrorism provisions.

iv. ECHR, Article 6

16.5 **ECHR Article 6 (3)**

Everyone charged with a criminal offence has the following minimum rights...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

16.6 Breach of any of these rules might lead to an accusation of unfairness in getting a confession, but only if there is a causal connection between the wrongful denial and the obtaining of the confession.

16.7 ***R. v. Alladice*** **[1988] 87 Cr App R 380**

A robbery took place at a post office when five men, one armed with a gun, terrorised the staff. Colin Alladice was interviewed by the police and according to them he admitted he was one of the robbers. There was further evidence that, immediately after the robbery, the appellant, aged 18 and unemployed, spent almost £3,000. He was asked if he wanted a solicitor and said he did although he refused to sign his name to that request.

The officer in charge of the investigation then asked Chief Inspector Corbett to authorise a delay in the implementation of the appellant's request. That authorisation was given. The chief inspector on the *voir dire* gave his reasons. The offence being investigated was a serious arrestable offence, robbery with firearms. Two men had already been arrested and charged. The appellant and one other had been detained. It was known that there were five men involved. One was therefore still at large, although his identity was known. None of the money had been recovered nor had the firearm been located. His experience led him to believe that in cases such as the instant one the criminals are apt to prepare contingency plans to be followed in the event of their arrest. These plans can be activated by conveying apparently innocent information or requests to a solicitor which could lead to the alerting of others or the disposal or redisposal of property, however innocent and respectable the particular solicitor might be.

His written authorisation was as follows: “Access refused on the following grounds: firstly, other man to be arrested; secondly, large amount of property to be [re]covered. Delay access until further notice.”

He was convicted of robbery and appealed on the ground that the evidence of his admissions was wrongly admitted because he had been denied access to a solicitor under section 58 of the Police and Criminal Evidence Act 1984.

The Court of Appeal held there was no evidence of reasonable grounds for the necessary belief in delaying access to a solicitor. There was no suggestion that the solicitor requested might be knowingly involved in any dishonesty or malpractice. The man still at large had already been alerted by events. There was no reason to believe that the access to a solicitor would, or indeed could, lead to any more impediment than already existed to the recovery of the gun or the stolen money. There was no suggestion that there might be interference with evidence or persons. The robbery was a serious enough offence, but the appellant could scarcely on his record or antecedent history be classed as a sophisticated criminal. In short, if the chief inspector believed that access to a solicitor would have any of the unwelcome results in sub-paragraphs *(*a*), (*b*)* or *(*c*),* there were no reasonable grounds for that belief. There was a breach of section 58.

However, although there had been a breach of section 58, there was no suggestion of oppression or that the confession might have been obtained as a result of the refusal of access to a solicitor and in any event, there was no reason to believe that that fact was likely in all the circumstances to render the confession unreliable. The allegation by the defendant that his admissions had been invented was rejected by the trial judge and the presence of a solicitor would have added nothing to the appellant's knowledge of his rights. Thus, the breach of section 58 did not in the circumstances of the case require the Court to rule inadmissible subsequent statements made by the appellant.

The appeal was dismissed.

17 FRUIT OF THE POISONED TREE

17.1 It may be the case that an inadmissible confession leads to the discovery of real evidence. For example, Barrie confesses to burying a body in the woods: the confession is ruled inadmissible, but the body is found where he said it would be. In such a case, the real evidence would usually be admissible, even though the confession is not.[11]

17.2 ***A v. Secretary of State for the Home Department (no.2)*** **[2006] 2 AC 221**

“I am prepared to accept… that the Secretary of State does not act unlawfully if he certifies, arrests, searches and detains on the strength of what I shall for convenience call foreign torture evidence. But by the same token it is, in my view, questionable whether he would act unlawfully if he based similar action on intelligence obtained by officially-authorised British torture. If under such torture a man revealed the whereabouts of a bomb in the Houses of Parliament, the authorities could remove the bomb and, if possible, arrest the terrorist who planted it. There would be a flagrant breach of article 3 for which the United Kingdom would be answerable, but no breach of article 5(4) or 6.”

[11] see *Director of Public Prosecutions v Ping Lin* [1976] AC 574 ; *R v Harz* [1967] 1 AC 760 ; *Lam Chi-ming v The Queen* [1991] 2 AC 212; *Lobban v The Queen* [1995] 1 WLR 877; *Lui Mei Lin v The Queen* [1989] AC 288; Mirfield *Successive Confessions and the Poisonous Tree* [1996] Crim LR 554.

H CHARACTER EVIDENCE

18 EVIDENCE OF BAD CHARACTER: Introduction and History

i. Introduction

18.1 The prosecution might wish to raise evidence of the defendant's bad character (especially his previous convictions) either to impugn his credibility or to make it seem more likely that he committed the offence in question.

18.2 The law relating to bad character evidence comprises a series of controversial provisions in the Criminal Justice Act 2003 which represent a sea-change to the old statutory and common law.

18.3 Whereas at common law it was not permitted to reveal the accused's previous convictions etc. to the jury except in very limited circumstances; the statutory rules presume that such evidence will be permitted as long as it meets the requirements of the Criminal Justice Act 2003.

ii. History of Bad Character Evidence

18.4 Bizarre as it now seems, until 1898, the defendant in a criminal trial was not allowed to testify at all. He was therefore protected from being asked questions about his previous convictions. However, if his counsel gave evidence about the defendant's good character, the prosecution was permitted to challenge it with evidence of his bad character.

18.5 Under the Criminal Evidence Act 1898, the defendant was permitted to give evidence and the issue of bad character evidence was provided for as follows:

18.6 **Criminal Evidence Act 1898**

s.1 Competency of witnesses in criminal cases

Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.

Provided as follows:—

(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:

(b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:

(c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged:

(d) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:

(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.

18.7 Any evidence given under subsection (f) (ii) would only be admitted as evidence of lack of credibility.

18.8 Under the old common law, evidence of previous convictions was permitted under the 'similar fact' rule. This would apply if the defendant was guilty of, or implicated in, other offences which were strikingly similar to the current offence in some unusual way.

18.9 ***R v. Boardman*** **[1975] AC 421**

Derrick Rowland Boardman, aged 45, a language school headmaster, was tried and convicted on counts alleging buggery with S (a pupil aged 16) and inciting H (a pupil aged 17) to commit buggery on him. The evidence of S and H related to separate incidents but bore certain similarities, in particular that Boardman had encouraged both to play the active part in the sexual act.

The judge ruled the evidence of S admissible upon the count involving H, and vice versa, and directed the jury, with a warning as to the possibility of conspiracy between S and H, that the evidence of each was capable of corroborating that of the other. Boardman appealed contending that such evidence was wrongly ruled admissible.

Held, dismissing the appeal, that although similar fact evidence should only exceptionally be admitted and requires a strong degree of probative force, the similarities in the evidence of S and H were such as to entitle the trial judge to use his discretion to admit the evidence in each case upon the count to which it did not directly relate, there being no distinction between cases where the defence is one of innocent association and where a complete denial is made.

"If the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused the manner in which the other crimes were committed may be evidence upon which a jury could reasonably conclude that the accused was guilty of the crime charged. The similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence. I would stress that the question as to whether the evidence is capable of being so regarded by a reasonable jury is a question of law.

"There is no easy way out by leaving it to the jury to see how they decide it. If a trial judge wrongly lets in the evidence and the jury convict, then subject to the proviso [to section 2 (1) of the Criminal Appeal Act 1968] , the conviction must be quashed. If, for example, A is charged with burglary at the house of B and it is shown that the burglar, whoever he was, entered B's house by a ground floor window, evidence against A that he had committed a long series of burglaries, in every case entering by a ground floor window, would be clearly inadmissible. This would show nothing from which a reasonable jury could infer anything except bad character and a disposition to burgle. The factor of unique or striking similarity would be missing. There must be thousands of professional burglars who habitually enter through ground floor windows and the fact that B's house was entered in this way might well be a coincidence. Certainly, it could not reasonably be regarded as evidence that A was the burglar.

"On the other hand, if, for example, A had a long series of convictions for burglary and in every case he had left a distinctive written mark or device behind him and he was then charged with burglary in circumstances in which an exactly similar mark or device was found at the site of the burglary which he was alleged to have committed, the similarity between the burglary charged and those of which he had previously been convicted would be so uniquely or strikingly similar that evidence of the manner in which he had committed the previous burglaries would, in law, clearly be admissible against him."
per Lord Salmon

18.10 The similar fact rule would also apply if the defendant seemed to have been the victim of a series of unfeasibly similar misfortunes.

18.11 The most famous example of ‘similar fact evidence’ is the ‘brides in the bath’ case.

***R v. George Joseph Smith* (1916) 11 Cr. App. R. 229**

George Smith, although married to someone else, went through a form of marriage with Bessie Munday. (In fact, he had seven bigamous marriages). He appropriated all her money and deserted her. Eighteen months later they met accidentally, and a letter was written to her relations, in which she acquiesced, giving his reasons for leaving her, and having reference to her money, which she was said to have lent to him.

A few months later they were at Herne Bay, living in a house alone together. Mutual wills were made, but as Munday had all the money and the appellant none, this was a mere blind. He then got counsel's opinion as to the effect of Munday's settlements; on the 2nd July he learnt that, with the exception of £8 a month paid her by her uncle, he could secure none of her money except by her death.

On the 6th July he selected a bath, although they had got on without one for five or six weeks, and the particular bath chosen was of a most inconvenient size, and was put in a most inconvenient room far from the water supply; the door of the room had no lock. It had never been suggested that Munday suffered from any illness until after the bath was delivered, but then he took Munday to Dr. French, and described her symptoms in such a way as to induce Dr. French to think that she had had an epileptic fit, even though it was very unusual for a woman of that age to have a succession of epileptic fits.

On the day before her death, Dr. French found Munday in perfect health though rather tired, this being caused by the very hot weather. According to the appellant's statement before the coroner, the couple got up together at 7.30 a.m.; it was 8.10 before the doctor was at the house, he having been sent for by the appellant. He found her dead in the bath, with her legs straight out with her soles up against the side of the bath. In no other position could a woman of that height be placed in that bath so that her mouth and nose should be under the water. According to the medical evidence the position of the legs was inconsistent with an epileptic fit.

In the trial that led to his conviction, the prosecution was permitted to introduce evidence of how two other women known to George Smith had died.

i. In December 1913, in Blackpool, one of his ‘wives’ - a woman named Alice Smith (*née* Burnham) – had died suddenly in a boarding house in that seaside resort while in her bathtub in an unlocked bathroom. Smith had taken out a hefty life insurance policy on her having had her diagnosed as epileptic.

ii. In December 1914, a woman called Margaret Lloyd had also been found drowned in a bathtub in an unlocked bathroom, following an apparent fit. George Smith was a lodger in the same house.

As the trial judge said: *“If you find an accident which benefits a person and you find that the person has been sufficiently fortunate to have that accident happen to him a number of times, benefiting him each time, you draw a very strong, frequently an irresistible inference, that the occurrence of so many accidents benefiting him is such a coincidence that it cannot have happened unless it was design.”*

19 EVIDENCE OF BAD CHARACTER: CJA 2003 Definitions

i. Introduction

19.1 The confusions and complexities of the law in this area – combined with a desire to secure more convictions – led to a review of the legislation, and two reports from the Law Commission in which they identified the dangers of admitting evidence of the defendant's bad character: the jury might give such evidence too much weight both in terms of reasoning prejudice and moral prejudice.

19.2 In the event, Parliament legislated to admit character evidence more readily than the Law Commission had recommended. The shield of the CEA 1898 was replaced by the gateways of the Criminal Justice Act 2003. This presumes that bad character evidence will be admitted, rather than presuming that it will not.

ii. Abolition of the Common Law and Repeal of the CEA 1898

19.3 **CJA 2003, s.99**

Abolition of common law rules

(1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.

(2) Subsection (1) is subject to section 118(1) in so far as it preserves the rule under which in criminal proceedings a person's reputation is admissible for the purposes of proving his bad character.

iii. Definition of Bad Character

19.4 **CJA 2003, s.98**

"Bad character"

References in this Chapter to evidence of a person's "bad character" are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—

(a) has to do with the alleged facts of the offence with which the defendant is charged, or

(b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

19.5 **CJA 2003, s.112**

Interpretation of Chapter 1

(1) In this Chapter— "misconduct" means the commission of an offence or other reprehensible behaviour;

19.6 **Explanatory Notes to the CJA 2003**

a. S.98 defines the sort of evidence whose admissibility is to be determined under the new statutory scheme. The definition covers evidence of, or of a disposition towards, misconduct. The term "misconduct" is further defined in section 112 as the commission of an offence or other reprehensible behaviour. This is intended to be a broad definition and to cover evidence that shows that a person has committed an offence, or has acted in a reprehensible way (or is disposed to do so) as well as evidence from which this might be inferred.

b. The definition is therefore intended to include evidence such as previous convictions, as well as evidence on charges being tried concurrently, and evidence relating to offences for which a person has been charged, where the charge is not prosecuted, or for which the person was subsequently acquitted… Thus, if there were a series of attacks and the defendant were acquitted of involvement in them, evidence showing or tending to show that he had committed those earlier attacks could be given in a later case if it were admissible to establish that he had committed the latest attack.

c. Evidence not related to criminal proceedings might include, for example, evidence that a person has a sexual interest in children or is racist.

d. The scheme does not affect the admissibility of evidence of the facts of the offence. This is excluded from the definition, as is evidence of misconduct in connection with the investigation or prosecution of the offence. This evidence is therefore not governed by the new statutory rules.

iv. Reprehensible Behaviour

19.7 The precise meaning of “reprehensible behaviour” has been the subject of some judicial debate. Not all unsociable or uncommendable behaviour will reach the threshold of being reprehensible.

19.8 ***R. v. Gary Osbourne*** **[2007] Crim LR 712**

Evidence that the defendant, on trial for the murder of a friend, had been aggressive towards and shouted at his partner over the care of their infant was inadmissible, as that behaviour did not amount to "reprehensible behaviour" within the meaning in the Criminal Justice Act 2003 s.112.

The victim, a drug dealer with whom Osbourne, as a drug user, had been friendly for many years, had been fatally stabbed in his flat. Osbourne was charged with his murder. During the trial, the judge admitted evidence of Osbourne's statements to the doctor who had examined him following his arrest. The doctor stated that Osbourne had said he had suffered from paranoid schizophrenia for many years and referred to tablets he had previously taken. The judge also admitted the evidence of Osbourne's former partner (K) that Osbourne had been diagnosed schizophrenic and put on medication, and that if Osbourne did not take his medication, he was liable to snap at any time and be aggressive towards her and their young son, and shout at her, although he was never violent.

The judge found that it was evidence of Osbourne 's bad character and was admissible as important explanatory evidence, under the Criminal Justice Act 2003 s.101(1)(c), without which the jury would have had difficulty properly understanding and evaluating the other evidence in the case.

The judge had also rejected a submission that the evidence should be excluded under the Police and Criminal Evidence Act 1984 s.78.

Osbourne contended that the admission of that evidence had rendered his conviction unsafe. He submitted that the evidence was not in law evidence of bad character and was not admissible. It was not "reprehensible behaviour", as defined in s.112 of the 2003 Act, nor was it admissible under any other rule of evidence.

Osbourne argued that even if it had been, it ought to have been excluded under s.78 of the 1984 Act, as there was a real possibility that the jury might have used the evidence that Osbourne suffered from a mental illness in order to provide an explanation for an otherwise inexplicable murder, and that the jury had heard no expert evidence as to any connection between the symptoms of that illness and the act of killing, or as to the effect of Osbourne not taking medication.

Held: Appeal dismissed.

(1) The evidence given by K about Osbourne 's behaviour was not admissible. However, once it had been admitted, the jury should have been directed that it was not relevant to the charge before them. In the context of the instant offence, shouting at a partner in the manner described by K could not amount to reprehensible behaviour within the meaning in s.112 of the 2003 Act. Shouting between partners over the care of a young child was not to be commended but in the context of a charge of murdering a close friend, it did not cross the threshold contemplated by the words of the statute. Further, it was not "important explanatory evidence" within the meaning of s.101(1)(c) or admissible as background history relevant to the offence charged.

(2) In the circumstances, however, the wrongful admission of that evidence did not create any doubt about the safety of the conviction. In his summing up, the judge had summarised fairly, and in a way about which there could be no complaint, K's evidence, to the extent that, short of reversing his earlier

ruling, he could hardly have watered down its significance more than he had. Further, the prosecution case had been very strong and had several strands.

Commentary

"*Reprehensible conduct*". The facts of this case provide further illustration of the uncertain scope of the term "reprehensible behaviour", which is used in s.112 of the Act. In *Renda*, the court stated that there must be some element of blameworthiness or culpability in any behaviour before it could be considered "reprehensible" under s.112(1). The court in the present case found that the evidence of the appellant's partner that he became verbally aggressive when he had not taken his medication was not evidence of "reprehensible behaviour". The reasoning leading to this conclusion is less than clear. The court observed that "shouting between partners over the care of a very young child is not of course to be commended …".

Munday suggests that the word "reprehensible" in ordinary usage may denote a range of misdoings, from the relatively serious through to "minor detours from perceived paths of righteousness" (R. Munday, "What Constitutes "Other Reprehensible Behaviour' under the Bad Character Provisions of the Criminal Justice Act 2003" [2005] Crim. L.R. 24 at pp.31-34). The appellant's conduct might at first sight be thought to fall somewhere on this broad spectrum of conduct. However, whether or not oral aggression amounts to "reprehensible conduct" will depend both on the particular circumstances in which statements are made, and the motives of its maker. In some cases, for example where it is directed at an aggressor in order to avert a physical attack on the maker or another, it may be considered a morally justified, even virtuous act. In others, if made in order to provoke physical violence, for example, it would clearly amount to reprehensible conduct. In this respect the fact that the verbal aggression of the appellant in the present case was a response to what he perceived to be improper treatment by his partner of their child might have been relevant to the court's conclusion.

The term "reprehensible" is particularly vague and the drafters of the Act have presented the courts with an enduring challenge. Until some general principles emerge the likelihood is that determining the type of conduct which falls within its scope will be the result of a rather arbitrary process.

v. Bad behaviour other than previous convictions

19.9 Bad behaviour includes, but is not limited to, previous convictions.

19.10 ***R v. Lewis*** **[2014] EWCA Crim 48**

In two trials for offences arising out of a serious incident of public disorder occurring at the time of the widespread riots in England in August 2011, the judge had been right to admit bad character evidence in the form of videos which suggested that certain of the defendants were involved with gangs.

In assessing whether the admission of such evidence would have an adverse effect on the fairness of the trial, fairness to the prosecution, as well as to the defence, had to be considered.

20 EVIDENCE OF BAD CHARACTER: CJA 2003 Gateways

i. Criminal Justice Act 2003 s.101

20.1 **CJA 2003, s.101**

Defendant's bad character

(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—

(a) all parties to the proceedings agree to the evidence being admissible,

(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,

(c) it is important explanatory evidence,

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

(f) it is evidence to correct a false impression given by the defendant, or

(g) the defendant has made an attack on another person's character.

(2) Sections 102 to 106 contain provision supplementing subsection (1).

(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

ii. First Gateway: s. 101(1)(a)

"All parties to the proceedings agree to the evidence being admissible,"

20.2 It may well serve the defendant to agree to admitting bad character evidence, especially if it would furnish him with an alibi.

iii. Second Gateway: s.101(1)(b)

"The evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it."

20.3 It might be tactical for the defendant to bring up his past convictions himself, perhaps to suggest that they are not relevant to the case. However, once he has mentioned them, he can be cross-examined on them, and the prosecution could use them to suggest either lack of credibility or propensity: a potential Pandora's Box.

iv. Third Gateway: s.101(1)(c)

"It is important explanatory evidence."

20.4 Evidence under this gateway will be admitted if without it, the court would find it impossible or difficult properly to understand the evidence in the case, and its value for understating the evidence is substantial.

20.5 One problem with this is that, if the evidence is vital to understanding the main evidence, it should come under s.98(a) as something which has to do with the alleged facts of the offence with which the defendant is charged – which is admissible anyway. However, as explained below, it is crucial that judges correctly identify which gateway they are going through!

v. Fourth Gateway: s.101(1)(d) and s.103

"It is relevant to an important matter in issue between the defendant and the prosecution."

20.6 This is the successor to the similar fact rule, discussed above.

20.7 The words used in s.101(1)(d) - *it is relevant to an important matter in issue between the defendant and the prosecutio*n – are clarified in later sections.

20.8 **CJA 2003, s.103**

"Matter in issue between the defendant and the prosecution"

(1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include—

(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;

(b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.

(2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—

(a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged.

(3) Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

(4) For the purposes of subsection (2)—

(a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;

(b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.

20.9 **Explanatory Notes to the CJA 2003**

a. Section 103 relates to evidence of a defendant's bad character that is admissible because it is relevant to an important matter at issue between the defendant and the prosecution (see section 101(1)(d)*)*. Evidence might be relevant to one of a number of issues in a case. For example, it might help the prosecution to prove the defendant's guilt of the offence by establishing their involvement or state of mind or by rebutting the defendant's explanation of his conduct. Only prosecution evidence is admissible on this basis – section 103(6) – and the defendant may apply to have the evidence excluded under section 101(3).

b. Section 103(1)(a) makes it clear that evidence that shows that a defendant has a propensity to commit offences of the kind with which he is charged can be admitted under this head. For example, if the defendant is on trial for grievous bodily harm, a history of violent behaviour could be admissible to show the defendant's propensity to use violence. Evidence is not, however, admissible on this basis if the existence of such a propensity makes it no more likely that the defendant is guilty. This might be the case where there is no dispute about the facts of the case and the question is whether those facts constitute the offence (for example, in a homicide case, whether the defendant's actions caused death).

c. Where propensity is an issue, subsection (2) provides that this propensity may be established by evidence that the defendant has been convicted of an offence of the same description or category as the one with which he is charged. This is subject to subsection (3), which provides that the propensity may not be established in this way if the court is satisfied that due to the length of time since the previous conviction or for any other reason that would be unjust.

d. An offence of the same description is defined by reference to how the offence appears on an indictment or written charge. It therefore relates to the particular law that has been broken, rather than the circumstances in which it was committed. An offence will be of the same category as another if they both fall within a category drawn up by the Secretary of State in secondary legislation. An order establishing such categories will be subject to the affirmative procedure (see section 330(5)). The categories must contain offences that are of the same type (section 103*(*4**)**), for example, offences involving violence against the person or sexual offences.

e. Section 103(1)(b) makes it clear that evidence relating to whether the defendant has a propensity to be untruthful (in other words, is not to be regarded as a credible witness) can be admitted. This is intended to enable the admission of a limited range of evidence such as convictions for perjury or other offences involving deception (for example, obtaining property by deception), as opposed to the wider range of evidence that will be admissible where the defendant puts his character in issue by for example, attacking the character of another person. Evidence will not be admissible under this head where it is not suggested that the defendant's case is untruthful in any respect, for example, where the defendant and prosecution are agreed on the facts of the alleged offence and the question is whether all the elements of the offence have been made out.

Propensity to commit a similar crime

20.10 CJA 2003, s.101(1)(d) enables the admission of more propensity evidence than the common law would have done.

20.11 ***R. v Weir (Anthony Albert)*** **[2006] 1 WLR 1885 (CA)**

The appellants Weir, Somanathan, Yaxley-Lennon, Manister and Hong appealed against their convictions in five separate cases that raised points in relation to the bad character provisions of the Criminal Justice Act 2003.

The defendant in the first case was charged with sexual assault by touching a girl under the age of 13, contrary to section 7 of the Sexual Offences Act 2003. At the trial, the prosecution applied under section 101 of the Criminal Justice Act 2003 to adduce evidence of the defendant's bad character relevant to, or having substantial probative value in relation to, a matter in issue between the defendant and the prosecution, which by section 103(1) of the Act included a propensity to commit offences of the kind with which he was charged.

The evidence adduced was a previous conviction for taking an indecent photograph of a child, contrary to section 1 of the Protection of Children Act 1978 notwithstanding that such an offence had not been included in the category of offences listed in the Criminal Justice Act 2003 (Categories of Offences) Order 2004 for the purpose of section 103(2).

The defendant was convicted.

The defendant in the second case was charged with rape. At trial the prosecution applied under section 101 of the Act to adduce evidence from two other women alleging that they had been subjected to sexually charged approaches by the defendant similar to those which the complainant said had been made to her. The judge granted the application notwithstanding that, before the implementation of the Act, the evidence would not have satisfied the test for the admissibility of similar fact evidence which balanced probative value against prejudicial effect. The defendant was convicted.

The defendant in the third case was charged with assault. At trial the prosecution questioned the main defence witness about a previous caution for possession of drugs and then applied under section 100(1) for that evidence to be left with the jury as evidence of her bad character. The defence applied for the jury to be discharged on the ground that questions of credibility could not fall within the ambit of evidence "having substantial probative value" within section 100(1)(b) . The judge refused but warned the jury to disregard the caution as it did not show that she had been lying when giving her evidence. The defendant was convicted.

The defendant in the fourth case was charged with one count of rape and two counts of indecent assault. At the relevant time the defendant had been 39 and the complainant 13. The judge ruled that evidence which had been adduced of a previous sexual relationship between the defendant when aged 34 and a girl of 16 was admissible as bad character evidence under section 101; and, in relation to the charge of rape, allowed the jury, were it to decide that intercourse had taken place but be uncertain as to consent, to return instead a verdict of indecent assault on account of the girl's age, notwithstanding that an indictment for unlawful sexual intercourse would have been out of time. The defendant was convicted of indecent assault on all three counts.

The defendants in the fifth case were charged with violent disorder. Neither gave evidence but a co-defendant claimed that they had previously been victims of a knife attack but had refused to provide statements to the police and had also been arrested on suspicion of committing a serious assault but had been released without charge after the alleged victims refused to provide statements. The judge ruled that neither matter was misconduct so as to amount to bad character for the purposes of section 101 but was admissible at common law as having probative value. The defendants were convicted.

On appeal against conviction in each case—

Held , (1) dismissing the appeals in the first two cases, that for the purposes of section 103(1) of the 2003 Act evidence of propensity of a defendant to commit offences of the kind charged could include a caution for an offence of a similar character notwithstanding it was not included in the list of offences prescribed under section 103(4) or, in a trial for rape, evidence by other women of sexually charged behaviour by the defendant similar to that alleged by the complainant notwithstanding that it might not have satisfied the common law test for the admissibility of similar fact evidence, the common law rules governing admissibility of evidence having been abolished by section 99(1) of the Act; and that, accordingly, the evidence in each case had been admissible and the convictions would stand.

(2) Dismissing the appeal in the third case, that although the evidence of the bad character of a person, other than a defendant, which could be admitted under section 100(1)(b) of the 2003 Act as having substantial probative value in relation to a matter in issue in the proceedings included matters relating to the credibility of that person, evidence that a witness for the defence had a previous caution for possession of drugs did not have substantial probative value in relation to the credibility of that person's account of an incident she had witnessed; that the evidence so disclosed in relation to the witness in the third case had therefore been inadmissible; but that the judge had given sufficient warning to the jury to have no regard to the caution; and that, accordingly, the conviction was not unsafe.

(3) Allowing the appeal in the fourth case against the conviction for indecent assault as an alternative to rape, that it was impermissible to commence a prosecution for indecent assault by leaving it to the jury as an alternative to a verdict of rape when the indecent assault consisted of unlawful sexual intercourse and a prosecution for such an offence could not have been commenced as being out of time; and that, accordingly, the conviction on that count would be quashed.

(4) Dismissing the appeals against the other convictions in the fourth case and allowing the appeals in the fifth case, that where previous conduct of a defendant did not amount to bad character evidence and so fell outside the ambit of section 101, section 99(1) did not apply and the common law rules governing admissibility of evidence in criminal proceedings remained applicable; and that, accordingly, in the fourth case the defendant's sexual relationship with the girl aged 16, being conduct that was not illegal, could not amount to evidence of bad character within section 98 of the 2003 Act and so fell outside section 101, but such conduct, by a defendant who was significantly older, had been admissible at common law as being of relevance to his denial of any sexual interest in the complainant, whereas in the fifth case the defendants' failure to give a statement to police after being attacked, and their arrest on suspicion but release without charge, also fell outside section 98 and thus section 101 but could not be admitted under common law rules as being of probative value without suggesting bad character, thus making their convictions unsafe.

20.12 ***R. v. D, P and U*** **[2012] 1 Cr App R 8**

In three separate cases the defendants were charged with offences involving the sexual abuse of children which had occurred over a substantial period. Each defendant denied any sexual contact with the children. In each case the judge admitted evidence that the defendant had viewed and/or made indecent photographs of children, relying on the bad character provisions of section 101(1) of the Criminal Justice Act 2003. All three defendants were convicted.

On the defendants' appeals against conviction—

Held, dismissing the appeals, that, where a defendant was charged with any prohibited sexual activity involving children, evidence that he possessed the relatively unusual character trait of having a sexual interest in children made it more likely that the allegation of the child complainant was true. Therefore, evidence that a defendant to such a charge had viewed or collected child pornography was capable of being admissible pursuant to section 101(1)(d) of the Criminal Justice Act 2003 as evidence which was relevant to an important matter in issue between the defendant and the prosecution, although it did not follow that it was automatically admissible; and that, in all the circumstances, in each case evidence that the defendant had viewed and/or made indecent photographs of children had been properly admitted against him pursuant to section 101(1)(d) of the 2003 Act as demonstrating a sexual interest in children.

20.13 ***R v. Mitchell*** **[2017] AC 571**

Where, in a criminal case, the Crown relied on several incidents to establish propensity on the part of the defendant, it did not have to prove beyond reasonable doubt that each incident had happened in the way alleged, and the jury did not have to consider the facts of each individual incident in isolation from one another. The jury had to consider the evidence in the round to determine whether propensity had been established to the criminal standard.

The defendant admitted that she had killed her ex-partner by stabbing him with a knife but claimed that she had acted in self-defence. At her trial for murder the prosecution, pursuant to articles 6(1)(d) and 8 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004, adduced disputed evidence of other incidents in which the defendant was said to have attacked or threatened to attack a person with a knife but which had not been the subject of any criminal convictions. The prosecution relied on that evidence to show that the defendant had a propensity to use knives in circumstances where she had been neither provoked nor acting in self-defence.

The defendant was convicted of murder but the Court of Appeal allowed her appeal on the ground that the judge ought to have directed the jury that, before they could take the disputed bad character evidence into account, they had to be sure of its truth.

The Crown appealed, challenging the Court of Appeal's ruling that the non-conviction bad character evidence had to be proved beyond a reasonable doubt if it were to be considered by the jury on the issue of propensity.

On the appeal to the House of Lords—

Held , dismissing the appeal, that the proper issue for the jury was whether they were sure that the propensity had been proved beyond a reasonable doubt; that when a sole incident was relied on as showing propensity the facts of that incident had to be proved to the criminal standard; but that, where there were several incidents relied on for that purpose, the jury did not have to be convinced of the

truth and accuracy of all aspects of each of the alleged incidents, and the facts of each individual incident did not have to be considered in isolation from the others.

In such circumstances, the evidence about propensity should be considered cumulatively rather than each incident being regarded separately. Propensity was at most an incidental issue in a trial which could not alone establish guilt, and it should be made clear to the jury that the most important evidence was that which bore directly on the guilt or innocence of the defendant; and that, accordingly, since in the instant case the trial judge had failed to give adequate directions as to how the question of propensity should be approached by the jury, the conviction was unsafe and had been properly quashed.

20.14 The Court of Appeal will not readily reverse the exercise of judicial discretion to admit evidence, but it has been known to do so.

***R. v. Tully and Wood* [2006] EWCA Crim 2270**

Stephen Tully and Kevin Wood appealed against their convictions for robbery as a joint enterprise. A taxi-driver had been robbed by two men who had been passengers in his taxi. One had threatened him with a knife. He had called the police and waited for them outside the house into which the two men had gone. When police attended at the house, they found the stolen possessions, a knife wrapped in clothing and Wood hiding under a bed, with Tully face down under a duvet on a bed. Wood and Tully made no comment in interview and the taxi-driver failed to pick them out at an identification procedure.

Tully and Wood appealed against their convictions for robbery as a joint enterprise. A taxi-driver had been robbed by two men who had been passengers in his taxi. One had threatened him with a knife. He had called the police and waited for them outside the house into which the two men had gone. When police attended at the house, they found the stolen possessions, a knife wrapped in clothing and Wood hiding under a bed, with Tully face down under a duvet on a bed. Wood and Tully made no comment in interview and the taxi-driver failed to pick them out at an identification procedure.

The important issues to which the convictions were said to be relevant were:

1. that Wood and Tully each had a propensity to commit the type of offences with which they were now charged;

2. that they had committed offences jointly in the past and had that propensity as well.

Whilst the Crown had intended putting in only the convictions for robbery and the jointly committed offence, the judge had encouraged them to put in all the offences of dishonesty, on the basis that s.103(2) of the Act provided that propensity to commit offences could be demonstrated by showing previous convictions of offences of the same description or category.

Wood and Tully submitted that the judge had taken far too broad an approach to the issue of propensity and that he was wrong to say that it was sufficient for the Crown to show a propensity to obtain other people's property by one means or another.

Held: The judge was wrong to hold, in effect, that a propensity to obtain other people's property by one means or another made it more likely that Wood and Tully would have committed the robbery in the instant case.

However, the safety of the convictions was not in doubt. There was strong evidence in the case and had the previous robbery and joint enterprise convictions been properly admitted Wood and Tully would undoubtedly have been convicted.

Propensity to be untruthful

20.15 The statute draws a distinction between propensity for untruthfulness and lack of credibility.

20.16 The definition of untruthfulness has caused some problems. It apparently does not mean the same thing as dishonest. (See Explanatory Note at 4.9 (e) above.)

20.17 ***R. v. Hanson*** **[2005] 1 WLR 3169**

"As to propensity to untruthfulness, this, as it seems to us, is not the same as propensity to dishonesty. It is to be assumed, bearing in mind the frequency with which the words honest and dishonest appear in the criminal law, that Parliament deliberately chose the word "untruthful" to convey a different meaning, reflecting a defendant's account of his behaviour, or lies told when committing an offence.

"Previous convictions, whether for offences of dishonesty or otherwise, are therefore only likely to be capable of showing a propensity to be untruthful where, in the present case, truthfulness is an issue and, in the earlier case, either there was a plea of not guilty and the defendant gave an account, on arrest, in interview, or in evidence, which the jury must have disbelieved, or the way in which the offence was committed shows a propensity for untruthfulness, for example, by the making of false representations. The observations made above in para 9 as to the number of convictions apply equally here." per Rose LJ at para 13

vi. Fifth Gateway: s.101(1)(e) and s.104

"It has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant."

20.18 The evidence must have substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

20.19 **CJA 2003, s104**

"Matter in issue between the defendant and a co-defendant"

(1) Evidence which is relevant to the question whether the defendant has a propensity to be untruthful is admissible on that basis under section 101(1)(e) only if the nature or conduct of his defence is such as to undermine the co-defendant's defence.

(2) Only evidence—

(a) which is to be (or has been) adduced by the co-defendant, or
(b) which a witness is to be invited to give (or has given) in cross-examination by the co-defendant, is admissible under section 101(1)(e).

20.20 There is no exclusionary discretion under this gateway, so the courts have set a high threshold of admissibility. The underlying assumption is that if the evidence has 'substantial probative value in relation to an important matter', it would not be unfair to admit it anyway.

20.21 ***R. v. Phillips*** **[2012] 1 Cr App R 25**

It was the prosecution's case that Phillips and a number of co-accused - Thomas Scragg and Paul Scragg - had conspired with others to cheat the Revenue by paying a workforce without the deduction of tax and national insurance, failing to account for tax and national insurance, falsely representing that work had been subcontracted to companies for which payments including VAT had been made and failing to account for VAT. Phillips and Thomas Scragg accepted that a fraud had been in progress but each denied responsibility.

At trial Phillips applied to adduce evidence of Scragg's bad character. The evidence Phillips sought to adduce was; (i) Scragg's previous conviction for conspiracy to defraud; (ii) Scragg's conviction for using threatening behaviour; (iii) previous investigations into Scragg whereby he was implicated in CIS Revenue fraud. That evidence related to events during the period before Phillips was alleged to have

formed or joined the conspiracy. Phillips also sought to adduce evidence from the post-indictment period whereby Scragg was implicated in fraud. The judge admitted the evidence of the conviction for conspiracy to defraud but refused to allow Phillips to adduce the other evidence.

Phillips contended that the judge had wrongly refused him leave under the Criminal Justice Act 2003 s.101(1)(e) to adduce evidence of the bad character of Scragg.

Held: Appeal dismissed.

(1) The statutory test for admissibility of evidence under s.101(1)(e) was that evidence sought to be adduced had to be of "substantial probative value". The principle factual issue raised by P and contested by S was that he was an innocent recruit to an existing dishonest scheme. The judge was not required, when assessing whether the probative value of the evidence was substantial, to examine each piece of evidence going to the same effect in isolation of the rest of the evidence. The main issues between P, S and the other co-accused was whether P was recruited by S to perpetuate an existing fraud and, if so, whether he was recruited as an innocent front man (see para.48 of judgment). The evidence implicating S in CIS fraud undoubtedly amounted to evidence of substantial probative value in relation to the issue whether S was, in the months preceding the instant fraud, engaged with others in the fraudulent use of CIS certificates. If P could persuade the jury that he was recruited to an existing fraud the thrust of S's denial might be undermined and the evidence should have been admitted. However, the judge was entitled to refuse to admit evidence of S's alleged involvement in a later fraud. The prosecution had adduced evidence that following P's departure from the firm the fraud had continued, which provided the strongest indication that contrary to S's case he was implicated in the fraud throughout. Further, the judge was correct to rule that the previous conviction for threats and intimidatory behaviour was not admissible.

(2) The judge had no discretion to exclude the evidence once a defendant had established the statutory criteria (para.59). (3) Whilst the evidence should not have been excluded, it did not affect the fairness of P's trial or the safety of the verdict

vii. Sixth Gateway: s.101(1)(f) and s.105

"It is evidence to correct a false impression given by the defendant."

20.22 **CJA 2003, s.105**

"Evidence to correct a false impression"

(1) For the purposes of section 101(1)(f)—

(a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;

(b) evidence to correct such an impression is evidence which has probative value in correcting it.

(3) A defendant is treated as being responsible for the making of an assertion if—

(a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),

(b) the assertion was made by the defendant—

(i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it,
and evidence of the assertion is given in the proceedings,

(c) the assertion is made by a witness called by the defendant,

(d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or

(e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.

20.23 The court must take care to distinguish situations where the defendant is creating a ‘false impression’ from those where he is simply denying the offence.

20.24 ***R v. Ovba*** **[2015] EWCA Crim 725**

A conviction for assault was unsafe where a judge had wrongly admitted evidence of an offender's bad character in order to correct a false impression given by the offender about her character. The character evidence she introduced had been too unspecific and insubstantial to support the introduction of bad character evidence.

The appellant appealed against her convictions for assault and dangerous driving.

She had outstanding county court fines. The victim, a bailiff, spotted her car and blocked it in with his car, intending to clamp it. The appellant returned to her car, which she moved backwards and forwards in an attempt to drive away. The victim clung onto her bonnet, but fell to the ground injuring his elbow and back.

The Crown's case had been that she deliberately and recklessly assaulted the victim by driving her car at him in a dangerous manner. She argued that the victim had not identified himself as a bailiff and that she had attempted to drive away because she feared for her own safety.

The appellant had a previous conviction for robbery and a caution for battery. During cross-examination she said that she was a "friendly person" and that she had witnessed the effect of domestic violence when she had been growing up. The Crown applied to introduce her previous convictions under the Criminal Justice Act 2003 s.101(1)(f) to correct the false impression that she was not capable of violence. The judge ruled that the appellant's remarks gave rise to the implied assertion that she was not the sort of person who would have committed these offences, and admitted her previous convictions. She was sentenced to a six-month suspended prison term of imprisonment, with an order that she complete 100 hours of unpaid work and ordered to pay a £250 compensation order.

The appellant submitted that the judge should not have allowed evidence of bad character to be introduced during the trial.

Held: Appeal allowed in part.

The appellant's observations given in cross examination had been too fragile a foundation on which to allow the introduction of her bad character. What she had said did not amount to a factual statement that she was not the sort of person who would get into fights. The evidence given by her had been too unspecific and insubstantial to support the introduction of bad character evidence.

The assault conviction was quashed, but the wrongful admission of bad character evidence had no impact on the conviction for dangerous driving. The suspended sentence and compensation order were quashed, and only the 100 hours community service element remained.

viii. Seventh Gateway: s.101(1)(g) and s.106

"The defendant has made an attack on another person's character."

20.25 **CJA 2003**

s.106 "Attack on another person's character"

(1) For the purposes of section 101(1)(g) a defendant makes an attack on another person's character if—

(a) he adduces evidence attacking the other person's character,

(b) he (or any legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or

(c) evidence is given of an imputation about the other person made by the defendant—
(i) on being questioned under caution, before charge, about the offence with which he is charged, or
(ii) on being charged with the offence or officially informed that he might be prosecuted for it.

(2) In subsection (1) "evidence attacking the other person's character" means evidence to the effect that the other person—

(a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or

(b) has behaved, or is disposed to behave, in a reprehensible way;

and "imputation about the other person" means an assertion to that effect.

(4) Only prosecution evidence is admissible under section 101(1)(g).

20.26 ***R. v. Singh (James Paul)*** **[2007] EWCA Crim 2140** gives guidance on this section.

Singh was charged with robbery. There was a second charge of assault on the same victim about a month afterwards. The defendant and the victim lived in the same large block of flats. According to the victim the appellant, whom he did not know, had waylaid him in the lift, pressed a knife to his neck and, assisted by another youth who was neither identified nor caught, had taken his money and his phone from his pocket, together with a gold chain from round his neck. The victim could not tell the police who it was who had done it. However, according to him he subsequently saw the appellant in the area of the flats. Eventually, about a month later, there was the further incident in which, according to the victim's account, he was pushed at, threatened and spat upon.

Immediately after that he was able to get the police to go to a flat which he believed he had seen his assailant enter and there on the stairwell outside it the police found and arrested the appellant.

When he was interviewed the following morning, the appellant said that he did not know the complainant and he had never had anything to do with him. He suggested it was probably a case of mistaken identity. He said that he would have been either at his parents' home or at the bookmakers at the relevant time. There followed that afternoon a video identification procedure for the complainant. The complainant identified the appellant as the person responsible for both attacks upon him.

At the trial the appellant's case was different to the one that he had advanced in interview. He said now that he did know the complainant, at least to this extent. On the occasion of the alleged robbery he, the appellant, had been with some friends. They had been approached by the complainant and his girlfriend. The complainant had asked the appellant and his friends if they had any crack cocaine to sell. That having drawn a blank, the complaint had successfully gone off and found a supplier of such drugs nearby. Having done that, said the appellant, the complainant had invited the appellant back to his flat to "chill out". As a result, he and his two friends had spent three or four hours that afternoon drinking and smoking in the complainant's flat. The complainant had been smoking the crack which he had bought. There had been no robbery. What had happened, according to the appellant, was that as they were leaving one of his friends had quite independently of him helped himself to the

mobile phone and the chain which had been left lying about on an occasional table. The appellant contended that he had nothing whatever to do with that. The appellant accepted that he had lied in interview in saying that he did not know the complainant and he gave as a reason for that that he had been protecting the friend who had stolen the chain and, moreover, he had not wanted his girlfriend to know that he had spent the evening, among other things, smoking cannabis.

As to the second assault the appellant's case was that it was pure invention and he had not seen the complaint at all on that day.

That case was properly put to the complainant when the complainant gave evidence. The appellant was a man of bad character in that he had convictions for disorder, assaults on policemen, harassment, criminal damage and driving with excess alcohol. Those were offences committed over a period of about two-and-a-half years prior to the present allegations and within about three years or so of the trial.

The Crown applied to adduce this evidence of bad character under section 101(1)(g) on the ground that the appellant had made an attack on the character of the complainant. On the appellant's behalf it was conceded that such an attack had been made and that accordingly the gateway was passed. The Recorder was, however, asked to exercise his discretion under section 101(3) not to admit the evidence. He rejected that submission. He concluded that the evidence would not have such an adverse effect upon the fairness of the proceedings that it should be excluded. He rightly observed that the case depended very largely on which of the complainant on the one hand and the appellant on the other was telling the truth. He went on, in giving his decision, to say this:

"This is a case where the credibility of the prosecution's principal witness is plainly to the fore. It is going to come down to whether the jury are sure that he has told the truth when he says that the defendant robbed him … and assaulted him. … or whether they think it is or may be true, as the defendant now says, that the phone was simply taken by somebody else and all this has been made up to cover up what has occurred.

"Plainly, the questions which were put to the victim about his interest in obtaining crack cocaine and having earlier that day crack cocaine were put to undermine the credibility of the victim, and to cast doubt in the minds of the jury as to whether they should believe him, if he was the kind of person, as they suggest, who was interested in obtaining Class A drugs and had earlier that day bought them. For what other reason can those questions have been put?

"It seems to me that to admit these convictions, as the prosecution ask me to permit, would not have such an adverse effect on the fairness of the proceedings that I ought not to admit it, so that the jury may know the character of the person on whose behalf allegations — which were stoutly denied — but allegations which were made against the victim, plainly with the intention of damaging him in the eyes of the jury; and accordingly I admit his bad character."

In the unsuccessful appeal, Hughes LJ discussed the application of s.101(1)(g)

"The purpose of gateway G is to enable the jury to know from what sort of source allegations against a witness (especially a complainant but not only a complainant) have come.

"Gateway G does not depend upon propensity to offend as charged or upon propensity to be untruthful in the sense of having a track record for untruthfulness. The purpose that it has is the one which we have identified. Of course, it is well established that if a defendant's bad character admitted because gateway G has been passed does also go to show propensity to offend as charged or to be untruthful it is open to the jury to use it for the relevant purpose. That, however, is not this case and such has not been suggested. It does not, however, follow, that it is admissible only if it also shows one or other of those propensities. To say that would be tantamount to saying that evidence which is admissible through gateway G ought to be excluded as a matter of discretion unless it also passes gateway D. There is clearly no warrant in the statute for construing it in that way — just the reverse. The Act plainly demonstrates that the gateways are independent, although of course in some cases more than one of them may be passed. The argument which we are addressing would, if accepted, deprive gateway G of much of its application." per Hughes LJ at paras 9 and 10

21 THE EXCLUSIONARY DISCRETION

21.1 **CJA 2003, s.101: Defendant's bad character**

(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

21.2 Note that s.101 (3) and (4) only apply to the fourth and seventh gateway.

21.3 "Fairness of the proceedings" includes fairness to the prosecution as well as to the defence.[12]

22 THE CHILD DEFENDANT

22.1 **CJA 2003, s.108: Offences committed by defendant when a child**

(2) In proceedings for an offence committed or alleged to have been committed by the defendant when aged 21 or over, evidence of his conviction for an offence when under the age of 14 is not admissible unless— (a) both of the offences are triable only on indictment, and

(b) the court is satisfied that the interests of justice require the evidence to be admissible.

[12] *R. v. Lewis* [2014] EWCA Crim 48.

I SILENCE

23 SILENCE AS A CONFESSION

23.1 The right to remain silent in the face of interrogation from an officer of state is a fundamental aspect of the privilege against self-incrimination.

23.2 However, remaining silent when accused of a crime might be taken to be a tacit acceptance of the allegation, especially when the accusation is made by someone on equal terms with the person they are accusing.

23.2 Thus, silence may sometimes equate to a confession, and if such a 'confession' is to be admitted as evidence, it will be subject to the usual rules relating to confessions to be found in PACE 1984 – i.e.

1. The oppression test: s.76 (2) (a)
2. The reliability test: s.76 (2) (b)
3. The fairness test: s.78
4. The common law test: s.82 (3)

UNDER STATUTE

23.4 According to PACE 1984 s.82, a confession includes any statement adverse to the person who made it whether made in words *or otherwise*.[13] Therefore, the accused may accept the accusation of another so as to amount to a confession not only by words, but also by conduct, demeanour or even by silence.

AT COMMON LAW

23.5 The common law rules relating to statements made in the presence of the accused have been preserved by the Criminal Justice Act 2003

Criminal Justice Act 2003

s.118: Preservation of certain common law categories of admissibility

(1) The following rules of law are preserved… (5) Any rule of law relating to the admissibility of confessions or mixed statements in criminal proceedings.

23.6 The common law principles governing the admissibility of confessions made indirectly by acknowledgement (whether by words, conduct or silence) were examined in *R. v. Norton* [1910] 2 KB 496.

23.7 ***R. v. Norton* [1910] 2 KB 496**

Stephen Norton was convicted on a charge of carnally knowing a girl called Marjory Truman who was under the age of thirteen years. He was sentenced to ten years' penal servitude, He appealed against his conviction on the ground that the judge had misdirected the jury as to the effect of this evidence.

THE ALLEGED FACTS

The evidence against Norton was entirely circumstantial, with the exception of that relating to the statements of the girl and the answers of Norton. He appealed against his conviction on the ground that the judge had misdirected the jury as to the effect of this evidence.

The evidence was that, on being asked by Norton who had done it, she said: "You," and, on being asked by another person, she said: "Stevie Norton," and pointed to Norton.

Norton said: "No, Madge, you are mistaken"; and then she said: "You have done it, Stephen Norton," and pointed to him again.

[13] PACE 1984 s.82(1).

According to one witness, he then lifted his arms and said: “If I have done it I hope the Lord will strike me dead,” and according to another witness: “If you say so I might as well put my clothes on and go home.”

There was, therefore, nothing in his answers necessarily amounting to an admission of the girl's statements.

THE JUDGE’S DIRECTION TO THE JURY

The direction of the judge as to the effect of this evidence was as follows:

“One starts with that. Maggie Truman comes back from that awful night at 9 o'clock the next morning. Something is seen trying to get over the wall of that field, and Travis runs up and brings her down to her mother. The prisoner is brought into the house, and then there comes the dramatic scene, which is so dramatic that one is afraid that it takes away one's power of accurately estimating it, in which the man solemnly swears that he did nothing to the little girl, and the little girl twice or thrice points at him and says ‘Stevie Norton, you did it.’

“Gentlemen, you must consider that remark carefully. It is for you entirely, and anything I say as to fact you are to disregard if it does not agree with your own views; you are the judges of fact, and not I; you must consider this. Do you think, first of all, that after what she had gone through that night the little girl was in a condition to accurately remember, … but, gentlemen, at any rate the fact that the little girl did say so renders it necessary to very carefully consider what evidence is tendered on behalf of Stephen Norton.”

“You have then got him telling lies as to where he was, and you will probably think, if that is the position, that confirms very much what the little girl says, because, is he were the guilty man, he would be very likely to try and explain where he was at a material time by making some statement which must have been untrue, because, if he were the guilty man, he was in the wheat field and not in some other place. Gentlemen, you have to consider all these matters and you have to consider what weight is to be attached to the statement of the little girl.”

The Court of Criminal Appeal held that this was indeed a misdirection and quashed the conviction.

Pickford J. made several propositions relating to such evidence.

1. Statements made in the presence of the accused upon an occasion on which he might reasonably be expected to make some observation, explanation or denial are admissible in evidence if the judge is satisfied that there is evidence fit to be submitted to the jury that the accused, by his answer to them, whether given by word or conduct, including silence, acknowledged the truth of the whole or part of them.

2. If the statements are admitted, the question whether the accused’s answer, by words, conduct or silence, did or did not amount to acknowledgment of them should be left to the jury.

3. The judge should direct the jury that if they conclude that the accused acknowledged the truth of the whole or ay part of the statement, they may take the statement, or part of it, into consideration as evidence, but that without such an acknowledgement they should disregard the statement altogether.

23.8 The guidelines in *R. v. Norton* were approved by the House of Lords in *R. v. Christie* [1914].

23.9 ***R. v. Christie*** **[1914] AC 545**

THE ALLEGED FACTS

Frederick Butcher, aged 5, went out to play in some fields at 10 o'clock in the morning and returned at 10.30. He came back screaming and with his clothes disarranged. His mother took him across the fields and as she and her son were going towards Christie, Frederick said: “That is the man, mum”. A police constable who was on the spot asked him: “Which man?” and made him go right up to the man and identify him by touching him on the sleeve.

The little boy then said: “That is the old man, mum, who”— and then he described what Christie supposedly did to him. Christie replied: “I am innocent.”

Christie was convicted of an indecent assault upon the little boy. The Court of Criminal Appeal quashed the conviction upon the authority of *Rex v. Norton [1910] 2 K. B. 496*, on the ground that evidence of a statement made in the presence of the accused was not admissible against him unless he acknowledged the truth of the statement.

The case went to the House of Lords on two questions of law.

1. Whether the statement made by this Butcher in the presence and hearing of the accused and of a police constable was properly admitted in evidence; and

2. Whether, the child having been permitted to give evidence without being sworn, the judge had misdirected the jury in telling them that the statement so made by the boy in presence of the accused was material evidence implicating the accused, in corroboration of the boy's testimony given at the trial.

The House of Lords held that the evidence of identification was admissible, and with it the evidence of the defendant's demeanour on being challenged. However, the conviction would stay quashed because the judge had misdirected the jury as to the significance they should place on the denial: although it was admissible without corroboration.

"The rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part.

"It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them." per Lord Atkinson at p. 554

23.10 Silence is most likely to be taken to amount to a confession when the accuser and the accused are on equal terms, as an accused party is more likely to stay silent for his own protection when challenged by someone in authority.

***R. v. Mitchell* (1892) 17 Cox C.C. 503**

"Undoubtedly, when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true." per Cave J. at p.508

23.11 The principle from *R. v. Mitchell* (1892) was applied in *Donald Parkes v. The Queen* (1976), where it was held that when an accusation is made to the defendant's face by someone on equal terms, the fact that he does not respond by denying it might give the inference that he is admitting it.

23.12 ***Donald Parkes v. The Queen* [1976] 1 WLR 1251 (Privy Council: Jamaica)**

THE ALLEGED FACTS

Donald Parkes was convicted of murdering a young woman, Daphne Graham. The evidence against him was circumstantial and given mainly by Mrs. Graham, the mother of the deceased.

Parkes and Daphne Graham lived in separate rooms of a house owned by Mrs. Graham. She lived in the adjoining house.

According to her evidence Mrs. Graham left her house on the morning of September 14, 1971, at about 7.30 a.m. in order to go to work. She then saw her daughter standing at her room door. Before she left, she had seen the defendant standing on the veranda on to which the deceased's room opened. As soon as she had got on to the road outside the house, she was told something which caused her to return. She found her daughter in her room bleeding from two stab wounds from which she died three days later.

She was assisted to her bed and said something to her mother as a result of which Mrs. Graham went out of the room to the yard which was common to the two houses. There she found the defendant with a ratchet knife in his hand. The knife was at that time closed.

Mrs. Graham said to Parkes: “What she do you — why you stab her?”

Parkes made no reply, nor did he reply when she repeated the question.

Mrs. Graham then boxed him twice and seized him by the waist-band of his trousers saying she would keep him there until the police came. Parkes then opened the knife and made to strike Mrs. Graham with it. She noticed that it had blood stains on the blade. She put up her arm to defend herself and her finger was cut requiring five stitches.

Mr. Jarrett, the uncle-in-law of Parkes, who had by then arrived upon the scene, told Parkes to hand over the knife to him. Parkes did so, and Mr. Jarrett subsequently handed over the knife to the police.

THE DEFENDANT’S TESTIMONY

At the trial, Parkes made an unsworn statement from the dock. In the course of the statement he said that he had just woken up and gone out to wash his face in the yard when Mrs. Graham approached him and held him by the waist.

In substance, he confirmed Mrs. Graham's account of what was then said and explained that he said nothing in reply because he did not know what she was speaking about. He denied that he had stabbed at Mrs. Graham and accounted for the cut on her finger by saying that she had searched his pocket for the knife, had found the knife in it, opened it and said that she was going to stab him with it because he had stabbed her daughter. He took the knife from her and while he was doing so, she cut her finger with it.

THE JUDGE’S DIRECTION TO THE JURY

Smith C.J. instructed the jury that the failure of the defendant to reply to the accusation twice made against him by Mrs. Graham that he had stabbed her daughter, coupled with his conduct immediately after that accusation had been made, were matters from which the jury could, if they thought fit, draw an inference that the defendant accepted the truth of the accusation.

THE APPEAL TO THE PRIVY COUNCIL

The court applied the dicta of Cave J. in *Reg. v. Mitchell (1892) 17 Cox C.C. 503* to hold that in the circumstances, the Chief Justice was right to give this direction to the jury because the accused and the accuser were on an equal footing, and the defendant might have been reasonably expected to answer to the charge.

“Here Mrs. Graham and the defendant were speaking on even terms. Furthermore, as the Chief Justice pointed out to the jury, the defendant's reaction to the twice-repeated accusation was not one of mere silence. He drew a knife and attempted to stab Mrs. Graham in order to escape when she threatened to detain him while the police were sent for. In their Lordships' view, the Chief Justice was perfectly entitled to instruct the jury that the defendant's reactions to the accusations, including his silence, were matters which they could take into account along with other evidence in deciding whether the defendant in fact committed the act with which he was charged. For these reasons their Lordships have humbly advised Her Majesty that the appeal be dismissed.” per Lord Diplock at p.1254

23.13 Even an interview with a police officer could be taken to be on equal terms in the right circumstances.

R. v. Chandler **[1976] 1 WLR 585**

“We do not accept that a police officer always has an advantage over someone he is questioning. Everything depends upon the circumstances. A young detective questioning a local dignitary in the course of an inquiry into alleged local government corruption may be very much at a disadvantage. This kind of situation is to be contrasted with that of a tearful housewife accused of shoplifting or of a parent being questioned about the suspected wrongdoing of his son.” per Lawton LJ at p.589

23.14 *R. v. Christie* and *R. v. Mitchell* were applied by the Court of Appeal in *R. v. Chandler* [1976] 1 WLR 585

***R. v. Chandler* [1976] 1 WLR 585**

On January 24, 1975, Roy Frank Chandler was convicted at the Central Criminal Court of conspiracy to cheat and defraud and was sentenced by Judge King-Hamilton to three years' imprisonment.

THE ALLEGED FACTS

The prosecution's case against the defendant was that he was a member of a gang which had been formed to obtain colour television sets dishonestly. The co-defendants, Bernard Joy and Laurie Apicella, called on television hire shops giving false names, and dishonestly entered into hiring agreements without having any intention of paying the hire charges once they had obtained possession of a set. They got possession of a number and paid nothing.

Sets were delivered to various addresses, including a house in which the defendant's wife was living. Thereafter the sets disappeared. The defendant had been living apart from his wife at the material times. There was some shadowy evidence that the defendant had helped the gang to remove a dishonestly acquired television set which had been sold to a dissatisfied customer, but the prosecution accepted that this evidence alone could not support the conviction.

The only other evidence against the defendant came from a detective sergeant who spoke of an interview which he had had with him on November 23, 1973, at North Woolwich police station. The defendant's solicitor was present.

THE POLICE INTERVIEW

The interview went thus:

(Q) I am investigating the theft of a number of colour televisions. Some of these were delivered to 27, Eighth Avenue, a house of which you are part owner. I understand that you have not been residing there. When did you leave?

(A) March.

(Q) Have you visited?

(A) No, not until the trouble my wife's in. I came back to take some control.

(Q) You are actually saying you've never visited till …

(A) About three weeks ago.

(Q) You know there are some alterations being done in the house by a firm you're working for?

(A) Yes.

(Q) Have you done any work in the house?

(A) No.
(Q) I'm going to show you a hire purchase agreement in the name of Ward dated July 27 for the hire of a Spectra 26-inch colour television. It was delivered to 27, Eighth Avenue, on July 27, 1973. Certain identification details were seen by the firm, namely, a rent book in the name of R. C. Chandler of 116, Windsor Road, E.7; also a driving licence number. Can you tell me how these particulars got onto this agreement?

(A) Not prepared to say anything on that.

(Q) Do you know a man by the name of Laurie Apicella?

(A) No comment.

(Q) Could this man have got hold of a driving licence or rent book in your name?

(A) Don't wish to comment.

(Q) Do you know a man by the name of Bernard Joy?

(A) No.

(Q) Could this man have got hold of a driving licence or rent book in your name?

(A) I don't know whether he could or not.

(Q) Do you know him?

(A) No. In view of the circumstances, I suspect you may be concerned with these people I have mentioned in assisting them to steal rental televisions.

At this stage the defendant was cautioned. The questioning continued. The defendant answered some questions and refused to make any comment when asked others.

THE JUDGE'S DIRECTION TO THE JURY

"Although it is absolutely true that even if a person has not been cautioned, if an accusation is made against him and he either says nothing at all or makes a comment to that effect, like 'no comment,' or 'I am not saying,' you must not automatically say that that means he is guilty. That would be quite wrong. Nevertheless, it is for you — not for me or anybody else — to decide whether you think a series of answers like that do indicate in your view his guilt or innocence, or neither the one or the other but are completely neutral.

"In considering that of course you must bear in mind two matters: that where a man has been cautioned — which means being told that he need not say anything unless he wishes to do so, and if he does it will be taken down in writing and may be given in evidence — and thereafter he remains silent, that is absolutely within his right and he cannot be adversely criticised for so doing, because he accepts that part of the invitation in the caution to remain silent.

"Even if he is not cautioned, as Mr. Philips rightly said, it is part of what is known as his common law right to decline to answer questions. In those circumstances you must ask yourselves whether he did so in the knowledge that he was exercising his common law right to remain silent, or whether he remained silent because he might have thought if he had answered he would in some way have incriminated himself."

Later, when reminding the jury of the detail of the detective sergeant's evidence about the interview, the judge interrupted the narrative with this comment:

"From now on until a few answers later it is important to bear in mind, according to the prosecution, that no caution had been administered. According to Mr. Philips that is not important because, as he emphasised quite rightly, there is the common law right to refuse to answer questions.

*"According to me, and basing my decision on **Rex v. Christie**, it is a matter for you to determine, if you can, whether the refusal to answer questions was merely being evasive to protect his wife, evasive to protect himself, evasive because he did not know the answers, or evasive because he knew he was entitled to exercise his rights and not answer whether he knew the answer or not and was taking that stand upon the matter."*

THE APPEAL

The Court of Appeal quashed the conviction. Applying ***R v. Christie***, the court held that the judge had misdirected the jury as to the weight of guilt they might attribute to the defendant's silence, even before he had been cautioned

"To suggest, as the judge did, that the defendant's silence could indicate guilt was to short-circuit the intellectual process which has to be followed. Phillips in A Treatise on the Law of Evidence *pointed out this very error, at p. 334: "It very commonly happens, that evidence of the description referred to*

has the effect of misleading juries, who are frequently influenced by it… and are unable, notwithstanding any directions from a judge, to regard it solely as exhibiting demeanour and conduct. In many instances, especially where no observation has been made by the party on hearing it, the evidence is particularly liable to produce erroneous conclusions. An acquiescence in the truth of the statement is frequently inferred, though the inference may, from a variety of causes, be incorrect. Thus, the evidence is not only fallacious with reference to its object, but in its collateral effect is prejudicial to the investigation of truth."

The same kind of error is seen in the comment which the judge made as to whether the defendant had been evasive in order to protect himself. He may have been; but that was not what the jury had to decide. It follows, in our judgment, that the comments made were not justified and could have led the jury to a wrong conclusion.

"This is no legalistic quibble. We have looked closely at the evidence provided by the interview. There was no other as the defendant did not give any. Even if the comments had been made in accordance with ***Rex v. Christie****, we should have quashed the conviction as being unsafe. The defendant, for example, refused to say anything about the fact that his name and driving licence number had got onto a hire-purchase document.*

"This could not amount to anything more than the acceptance by him that these particulars were where the detective sergeant said they were. Further, he made no comment when asked if he knew Apicella; at the most this could only amount to some evidence that he did know him. He lied when he said he did not know Joy; but proof that he lied did not amount to proof of any fact other than that he had lied. It is unnecessary to examine the interview in any more detail. It suffices to say that it did not provide a safe foundation for an inference that the appellant had been a member of the conspiracy alleged."

per Lawton LJ at p.590

23.15 The modern authority on confessions by silence is ***R. v. Osborne*** (2005)

R. v. Stevie Osborne **[2005] EWCA Crim 3082**

On 13 April 2005, Stevie Osborne was convicted of murder. He appealed against the conviction on the ground that the trial judge wrongly admitted in evidence a statement made in Osborne's presence which was prejudicial to him and to which he did not object.

THE ALLEGED FACTS

At around 7.30pm on Wednesday 30 June 2004, Osborne was sitting with two friends, Luke Martin and Scott Cooper, on the pavement outside the Golden Lion Public House in Barking Road, Plaistow. Mohammed Omar, the deceased, was then 22 years old. He was accompanied by a young woman aged 17 who was related to him, Sahra Ali Hassain. As they walked along the pavement, they drew level with the appellant and his friends. Words were exchanged and a fight broke out, during which the deceased's tee-shirt was ripped, and during which he punched Osborne to the head. He and Sahra Ali Hassain then walked away from the incident.

Osborne and his friends crossed the road. They walked along on the other side in the same direction as the deceased. They came upon a shop front that was being renovated and there they each picked up a piece of timber. Osborne ran across the road. He ran up behind the deceased, swung the piece of wood and hit him on the right side of his head. After that one blow he ran back to the other side of the road.

The deceased was taken to hospital. He was found to have sustained a serious fracture of the skull. In due course it transpired that his skull was somewhat thinner than the norm. He died from that injury.

THE DEFENCE

There were several eye-witnesses to these events, including John Woolston, and Osborne admitted that he had hit the victim with a plank of wood.

However, Osborne claimed that he did not intend to kill the victim and at the time believed that he was acting in self-defence. He claimed that he had intervened after the victim (a taller and older man than himself) had attacked another youth at the scene. He said that he was assaulted by the victim and was thrown to the ground and suffered concussion, and that when attacking the victim with the piece of wood, he believed that the victim was about to assault him again.

THE DISPUTED EVIDENCE

In John Woolston's evidence, he said that two days after the deceased was killed, in company with his girlfriend Tiffany Lipper, they encountered Osborne and his two companions.

Tiffany said to Osborne: “Oh, why did you hit him for? I bet he ain't done nothing to you”.

One of Osborne’s companions replied: “Of course we don't like Asian people. They stink. Why do they come over to our country?” Osborne said nothing.

Tiffany then screamed at the appellant and Mr Woolston dragged her away. The three youths walked off smirking.

The judge permitted this incident to be put forward as a confession by Osborne.

THE APPEAL

The Court of Appeal held that the trial judge had correctly admitted the evidence.

“Where the defence challenges the prosecution's intention to put before the jury evidence of the defendant's reaction, or lack of reaction, to a statement made in his presence, three questions arise:

(1) could a jury properly directed conclude that the defendant adopted the statement in question?

(2) If so, (2) is that matter of sufficient relevance to justify its introduction in evidence?

(3) If so, (3) would the admission of the evidence have such an adverse effect on the fairness of the proceedings that the judge ought not to admit it?” per Lord Phillips CJ at para 19

24 THE RIGHT TO REMAIN SILENT: Introduction

24.1 The ‘right to silence’ used to comprise two separate rights:

- The privilege against self-incrimination
- The right not to have adverse inferences drawn from refusing to answer questions

24.2 Several propositions arose from these basic rights:

- A suspect was under no obligation to assist the police with their enquiries
- An accused was not obliged to give advanced notice of his defence
- An accused was not a compellable witness
- Although a judge might sometimes have been permitted to invite a jury to draw adverse inferences from a failure to testify, they could not be directed to assume guilt from such a failure.

24.3 These rights were severely curtailed by the Criminal Justice and Public Order Act 1994. In particular, although an accused retains the right to remain silent both at the interview and trial stage, ‘proper’ inferences may now be drawn from his failure to mention certain facts when questioned; and from his failure to give evidence at the trial.

History of the Right to Remain Silent and the Caution

24.4 There is a general right at common law not to incriminate oneself by answering inculpatory questions, and the idea that a suspect should be reminded of this right, and warned of the possibility that what he does say might be used to incriminate him, seems to date back to at least 1887, when it featured in the first Sherlock Holmes story, ‘A Study in Scarlet’, by Sir Arthur Conan Doyle:

The official was a white-faced unemotional man, who went through his duties in a dull mechanical way. "The prisoner will be put before the magistrates in the course of the week," he said: "in the meantime, Mr. Jefferson Hope, have you anything that you wish to say? I must warn you that your words will be taken down, and may be used against you."

"I've got a good deal to say," our prisoner said slowly. "I want to tell you gentlemen all about it." "Hadn't you better reserve that for your trial?" asked the Inspector."

24.5 Such a warning was also referenced by G. K. Chesterton in his 1909 novel, 'The Ball and the Cross'.

"No, sir," said the sergeant; "though most of the people talk French. This is the island called St. Loup, sir, an island in the Channel. We've been sent down specially from London, as you were such specially distinguished criminals, if you'll allow me to say so. Which reminds me to warn you that anything you say may be used against you at your trial."

24.6 The caution was given legal form by the Judges' Rules in 1912. These provided that, when a police officer had admissible evidence to suspect a person of an offence and wished to question that suspect about an offence, the officer should first caution the person that he was entitled to remain silent.

24.7 ***R. v. Leckey*** **(1944) KB 80**

A police officer making inquiries into the death of a woman, cautioned the appellant and said: "Do you care to give me an account of your movements late that day?"

The appellant replied: "I was with the girl. I want to be fair to you and to myself, and before I make a statement, I should like to get advice."

Later, the appellant, having been charged with the murder of the woman, was given a formal caution by a police officer to which, after some hesitation, he replied: "I have nothing to say until I have seen someone, a solicitor."

At the trial of the appellant the judge commented adversely on the appellant's silence after he had been cautioned by the police officers, and indicated that the appellant's failure then to declare his innocence was a consideration for the jury tending to prove his guilt.

Held by the Court of Criminal Appeal, that this comment was a misdirection which would justify quashing the conviction.

"An innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and if it were possible to hold that out to a jury as a ground on which they might find a man guilty, it is obvious that innocent persons might be in great peril."

per Viscount Caldcote CJ

24.8 A caution in the following form was typically used:

You have the right to remain silent, but anything you do say will be taken down and may be used in evidence.

24.9 In 1972, in its 11th Report, the Criminal Law Revision Committee proposed that where an accused fails to mention any fact relied on in his defence which he could reasonably have been expected to mention either before he was charged on being questioned by the police, or on being charged, the court should be entitled to draw such inferences as appear proper, and the caution should be replaced by a notice explaining the potentially adverse effect of silence.

24.10 The proposals were widely criticised, but in 1976 were adopted in Singapore, and in 1988 were adopted in Northern Ireland.

24.11 In 1988, Lord Lane CJ spoke strongly for their adoption in England and Wales.

R. v. Alladice **(1988) 87 Cr App R 380**

"In many cases a detainee, who would otherwise have answered proper questioning by the police, will be advised to remain silent. Weeks later, at his trial, such a person not infrequently produces an explanation of, or a defence to the charge the truthfulness of which the police have had no chance to check.

"Despite the fact that the explanation or defence could, if true, have been disclosed at the outset and despite the advantage which the defendant has gained by these tactics, no comment may be made to the jury to that effect. The jury may in some cases put two and two together, but it seems to us that

the effect of section 58[14] is such that the balance of fairness between prosecution and defence cannot be maintained unless proper comment is permitted on the defendant's silence in such circumstances. It is high time that such comment should be permitted together with the necessary alteration to the words of the caution." per Lord Lane CJ

24.12 The recommendations of the Criminal Law Revision Committee were implemented in the **Criminal Justice and Public Order Act 1994, s.34.**

24.13 ***R. v. Hoare (Kevin) and Pierce (Graham)* [2005] 1 WLR 1804** (see 5.5 below)

"The whole basis of section 34 of the 1994 Act, in its qualification of the otherwise general right of an accused to remain silent and to require the prosecution to prove its case, is an assumption that an innocent defendant — as distinct from one who is entitled to require the prosecution to prove its case — would give an early explanation to demonstrate his innocence. If such a defendant is advised by a solicitor to remain silent, why on earth should he do so, unless because of circumstances of the sort aired by the court in ***R v Roble*** [1997] Crim LR 449 *,* ***R v Argent*** *[1997] 2 Cr App R 27 and* ***R v Howell*** *[2003] Crim LR 405, he might wrongly inculpate himself?"* per Auld LJ at para 53

24.14 The modern caution is as follows:

You do not have to say anything, but it may harm your defence if you do not mention, when questioned, something which you later rely on in court. Anything you do say may be given in evidence.[15]

25 THE RIGHT TO REMAIN SILENT WHEN INTERVIEWED

25.1 The law relating to the inferences that may be drawn from not responding to police questions is now contained in the **Criminal Justice and Public Order Act 1994.**

25.2 *Inter alia*, the jury is now entitled to infer that the accused fabricated the explanation at a later date, if he refused to provide the explanation during police questioning. The jury is also free to make no such inference.

Criminal Justice and Public Order Act 1994

25.3 **Criminal Justice and Public Order Act 1994 s. 34**

Effect of accused's failure to mention facts when questioned or charged.

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact; or

(c) at any time after being charged with the offence, on being questioned under section 22 of the Counter-Terrorism Act 2008 (post-charge questioning), failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

[14] PACE 1984 s.58 (1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.

[15] PACE 1984, Code C, paragraph 10.5. Minor deviations are permitted under paragraph 10.7 as long as sense of the caution is preserved.

(2) Where this subsection applies—
b) a judge, in deciding whether to grant an application made by the accused under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.

(2A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in subsection (1) above.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above "officially informed" means informed by a constable or any such person.

(5) This section does not—

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or

(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.

25.4 **Criminal Justice and Public Order Act 1994 s.35**
Effect of accused's silence at trial.

(1) At the trial of any person for an offence, subsections (2) and (3) below apply unless—

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment with a jury, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—

(a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it.

(7) This section applies—

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;

(b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

25.5 **Criminal Justice and Public Order Act 1994 s.36**
Effect of accused's failure or refusal to account for objects, substances or marks.

(1) Where—

(a) a person is arrested by a constable, and there is—
(i) on his person; or
(ii) in or on his clothing or footwear; or
(iii) otherwise in his possession; or
(iv) in any place in which he is at the time of his arrest,

any object, substance or mark, or there is any mark on any such object; and

(b) that or another constable investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and

(c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies—

(b) a judge, in deciding whether to grant an application made by the accused under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged,
may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) above apply to the condition of clothing or footwear as they apply to a substance or mark thereon.

(4) Subsections (1) and (2) above do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

(4A) Where the accused was at an authorised place of detention at the time of the failure or refusal, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.

(5) This section applies in relation to officers of customs and excise as it applies in relation to constables.

(6) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.

(7) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

25.6 **Criminal Justice and Public Order Act 1994 s.37**
Effect of accused's failure or refusal to account for presence at a particular place.

(1) Where—

(a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and

(b) that or another constable investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and

(c) the constable informs the person that he so believes, and requests him to account for that presence; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies—

(b) a judge, in deciding whether to grant an application made by the accused under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998**;**

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged,
may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

(3A) Where the accused was at an authorised place of detention at the time of the failure or refusal, subsections (1) and (2) do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.

(4) This section applies in relation to officers of customs and excise as it applies in relation to constables.

(5) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for his presence at a place which could properly be drawn apart from this section.

(5) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

26 THE OPERATION OF SECTION 34

26.1 *In* ***R. v. Brian Argent*** [1997] 2 Cr. App. R. 27, the Court of Appeal identified six conditions which were to be met under s.34(1)(a) before a jury could infer guilt from the previous silence of the defendant.

1. There must be criminal proceedings.
2. The silence must have occurred before the defendant was charged.
3. The silence must have occurred during questioning under caution.
4. The questioning must have been directed at trying to discover if the defendant committed the crime.
5. The alleged failure by the defendant must be to mention any fact relied on in his defence in those proceedings.
6. The defendant failed to mention a fact which in the circumstances existing at the time of the questioning he could reasonably have been expected to mention when so questioned.

26.2 ***R. v. Brian Argent*** **[1997] 2 Cr. App. R. 27**

THE ALLEGED FACTS

Tony Sullivan was stabbed to death with a knife in the early hours of August 19, 1995, outside an East London nightclub, the Lotus Club. Brian Argent was arrested following an anonymous telephone call to the police which named him as the attacker.

The prosecution case was that Argent became aware that the Sullivan (who was unknown to him) had asked Argent's wife to dance in the club and had later attacked him outside. At the time of the attack Sullivan was, as the evidence showed, very drunk. There were eye-witnesses to the fight between Sullivan and another man. One witness who knew Argent named him and two others picked him out on an identity parade.

THE POLICE INTERVIEW

An interview was conducted by Detective Constable Armstrong on November 16, 1995, after an identification parade at which Argent had been identified. Argent was accompanied by an experienced solicitor, Mr Ryan, who gave the appellant certain advice.

The advice had essentially three limbs:

1. That in all the circumstances Argent was well-advised to remain silent;
2. That if he declined to answer questions there was a risk that inferences adverse to him might be drawn at the trial; and
3. That the decision whether or not to answer any questions was that of Argent.

In the light of this advice, Argent elected to say nothing and he accordingly replied “no comment” to a series of questions put to him by the officer.

THE TESTIMONY AT THE TRIAL

At the trial, Argent raised several issues of fact in his defence, which he had not previously mentioned. In particular, he claimed:

1. When he left the Lotus Club, he did not encounter Tony Sullivan;
2. He did not have a knife in his possession;
3. He did not inflict any knife wound upon Mr Sullivan;
4. He had no blood on his hand;
5. He met a friend Walter Lee on the way home who was able to confirm some of his account;
6. There was a baby sitter at his home who could give further confirmation; and
7. Throughout his journey from the club to his home he was accompanied by his wife who could support the entirety of his account.

THE JUDGE'S DIRECTION TO THE JURY

The judge directed the jury that they might draw adverse inferences from the fact that Argent did not mention these matters when questioned by the police, in accordance with section 34 of the Criminal Justice and Public Order Act 1994.

THE APPEAL

Argent was convicted, and appealed, *inter alia*, on the grounds that the judge erred in law and/or in the exercise of his discretion in failing to exclude the evidence of his interview with the police on November 16, 1995. That challenge was made under section 78 of the Police and Criminal Evidence Act 1984, which entitles a judge to exclude evidence which has an unfair effect on the conduct of a trial.

The Court of Appeal dismissed his appeal, and examined the operation of section 34 of the Criminal Justice and Public Order Act 1994.

"It is in our judgment important to bear in mind the detailed terms of section 34. It is convenient to begin by considering subsection (2)(d) which reads: "Where this subsection applies—… (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper."

The failure there referred to is a failure to mention at an earlier stage a fact relied on by the appellant in his defence, as is made plain by subsection (1)(a).

"Subsection (2)(d) empowers a jury in prescribed circumstances to draw such inferences as appear proper. That must mean as appear proper to a jury because the jury is the tribunal of fact and the drawing of appropriate inferences from the facts is the task of the tribunal of fact. The trial judge is of course responsible for the overall fairness of the trial and it is open to him to give the jury guidance on the approach to the evidence. There will undoubtedly be circumstances in which a judge should warn a jury against drawing inferences, but the judge must always bear in mind that the jury is the tribunal of fact and that Parliament in its wisdom has seen fit to enact this section.

"What then are the formal conditions to be met before the jury may draw such an inference? In our judgment there are six such conditions.

"The first is that there must be proceedings against a person for an offence; that condition must necessarily be satisfied before section 34(2)(d) can bite and plainly it was satisfied here.

"The second condition is that the alleged failure must occur before a defendant is charged. That condition also was satisfied here.

"The third condition is that the alleged failure must occur during questioning under caution by a constable. The requirement that the questioning should be by a constable is not strictly a condition, as is evident from section 34(4), but here the alleged failure did occur during questioning by a constable, Detective Constable Armstrong, and the appellant had been properly cautioned.

"The fourth condition is that the constable's questioning must be directed to trying to discover whether or by whom the alleged offence had been committed. Here it is not in doubt that Mr Sullivan was killed by someone. The Detective Constable was trying to discover who inflicted the fatal wound and whether the killing was murder or manslaughter, it being fairly clear that the offence must have been one or the other (unless the killer struck the fatal blow in the course of defending himself).

"The fifth condition is that the alleged failure by the defendant must be to mention any fact relied on in his defence in those proceedings. That raises two questions of fact: first, is there some fact which the defendant has relied on in his defence; and secondly, did the defendant fail to mention it to the constable when he was being questioned in accordance with the section? Being questions of fact, these questions are for the jury as the tribunal of fact to resolve. Here it would seem fairly clear that there were matters which the appellant relied on in his defence which he had not mentioned.

"These included the fact that he had had no quarrel with Mr Sullivan in the club; that he and his wife had left the club before the rest of the party; that he had not at any stage of the evening carried a knife; that he had not been involved in any altercation in the street in which Mr Sullivan was stabbed; that he saw and was a witness of no such altercation; that he saw Mr Lee in the street waiting for a cab;

that he went to a restaurant for a meal but found that he was too late and that the restaurant was closed; and that he returned home and saw his baby-sitter.

"The sixth condition is that the appellant failed to mention a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned. The time referred to is the time of questioning, and account must be taken of all the relevant circumstances existing at that time. The courts should not construe the expression "in the circumstances" restrictively: matters such as time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant. When reference is made to "the accused" attention is directed not to some hypothetical, reasonable accused of ordinary phlegm and fortitude but to the actual accused with such qualities, apprehensions, knowledge and advice as he is shown to have had at the time.

"It is for the jury to decide whether the fact (or facts) which the defendant has relied on in his defence in the criminal trial, but which he had not mentioned when questioned under caution before charge by the constable investigating the alleged offence for which the defendant is being tried, is (or are) a fact (or facts) which in the circumstances as they actually existed the actual defendant could reasonably have been expected to mention.

"Like so many other questions in criminal trials this is a question to be resolved by the jury in the exercise of their collective common-sense, experience and understanding of human nature. Sometimes they may conclude that it was reasonable for the defendant to have held his peace for a host of reasons, such as that he was tired, ill, frightened, drunk, drugged, unable to understand what was going on, suspicious of the police, afraid that his answer would not be fairly recorded, worried at committing himself without legal advice, acting on legal advice, or some other reason accepted by the jury.

"In other cases, the jury may conclude, after hearing all that the defendant and his witnesses may have to say about the reasons for failing to mention the fact or facts in issue, that he could reasonably have been expected to do so. This is an issue on which the judge may, and usually should, give appropriate directions. But he should ordinarily leave the issue to the jury to decide. Only rarely would it be right for the judge to direct the jury that they should, or should not, draw the appropriate inference."

per Lord Bingham, CJ

At any time before he was charged with the offence, on being questioned under caution… or on being charged with the offence or officially informed that he might be prosecuted for it…

26.3 s.34(1)(a) only applies in the case of an accused who has not been charged and is being questioned under caution, so will not apply if he simply refuses to leave his cell to attend the interview.

26.4 However, once the accused is charged, s.34(1)(b) will apply to have the same effect. Under Code C, para 16.2, the caution must also be given when someone is charged.

26.5 If the interviews under s.34(1)(a) are inadmissible (perhaps because of a breach of the Code of Practice), inferences may still be drawn from the accused's silence under s.34(1)(b), subject to the requirement of fairness.

26.6 ***R. v. Dervish*** **[2002] 2 Cr App R 105**

THE ALLEGED FACTS

The defendant was convicted of conspiracy to be concerned in the supply of Class A drugs.

THE POLICE INTERVIEW

At interview, after the involvement of an undercover police officer had been belatedly revealed to his representative by the police, he had made no comment in response to questions. When charged, he had likewise made no comment.

THE JUDGE'S RULING

At trial, while the interviews were ruled inadmissible because of breaches of the PACE 1984 Codes of Practice, no objection was taken to the admissibility of the charging process.

The trial judge was however invited to rule that the jury should not be permitted to draw any inference from the defendant's failure to mention at the time of charge facts he relied on at trial.

The judge ruled that at the time of charge the defendant was in a position to understand clearly what was being alleged against him and was in a situation that called out for explanation, and that therefore the jury were permitted to draw such an inference.

THE APPEAL

On appeal it was contended, among other things, that the trial judge's ruling was in error. It was argued that adverse inferences could never be drawn in circumstances where the defendant had made no comment in interview and the interview had been excluded. If it were otherwise, the police would have a "back-up" inference in the event that the interview was excluded, which would have the effect of nullifying the safeguards contained in 1984 Act and the Codes.

Held, dismissing the appeal:

(1) that a judge could leave to the jury the possibility of drawing an inference from silence at interview or an inference from silence at the time of charge, or an inference from both, providing no unfairness was thereby caused to the defendant. It was consequently open to the judge to direct the jury that an inference might be drawn from a failure to mention at the time of charge facts later relied upon even in cases where no inference could be drawn from silence at interview.

(2) The correct approach was adopted by the trial judge in reviewing thoroughly all the considerations which might have pointed to unfairness. If allowing the drawing of an inference would nullify the safeguards contained in the 1984 Act and the Codes of Practice, or there was bad faith on the part of the police, that would clearly be a basis upon which the judge should not permit the jury to consider drawing an inference.

Failed to mention any fact …

Prepared statements

26.7 It is common practice for an accused person (usually on the advice of his solicitor) to hand the police a prepared statement, and then to refuse to answer questions about it until the trial. In such circumstances, he has not 'failed to mention' the facts contained in the documents.

26.8 Thus, where a defendant has made a prepared statement which is read out to the police before the interview, and which is wholly consistent with the testimony he later gives in court, no adverse inference can be made from the fact that he refused to answer any questions at the interview.

26.9 ***R. v. Knight*** **[2004] 1 WLR 340 (CA)**

Philip Knight was arrested on suspicion of indecently assaulting the ten-year-old daughter of a friend.

THE ALLEGED FACTS

On 28 October 2002, with her mother's consent Knight took the little girl for a walk in a wood where she had not been before. After half an hour or so the defendant stood in front of her and put his right hand down her trousers, to rest on the top of her leg. He did not touch her knickers or crotch. Then he put his hand under her T-shirt and touched her stomach just above her navel. She tried to get away but his hand around her stomach restrained her. Then they moved on. Shortly afterwards he stopped her again. He put his hand down her trousers a second time and touched the top of her leg. She felt frightened and said she was sleepy and wanted to go home.

THE POLICE INTERVIEW

At the beginning of his interview with police, his solicitor read out a prepared statement giving the Knight's full account of what had happened on the day of the alleged assault. His version of events was that at one stage during the walk he had put his hands on the girl's shoulders to turn her round so that she could look at a deer. His hands never touched her skin, and he never touched her in the way she described.

On his solicitor's advice, he thereafter responded to all questions with the words “No comment”.

THE TESTIMONY AT THE TRIAL

At trial, Knight's evidence was the same as the account contained in the prepared statement.

The judge directed the jury that, the prepared statement notwithstanding, they were entitled to draw adverse inferences from the defendant's silence when questioned pursuant to section 34 of the Criminal Justice and Public Order Act 1994. Knight was convicted:

“Members of the jury, the weight to be given to that prepared statement is entirely a matter for you, but Mr Knight admits that thereafter he refused to answer any of the questions put to him by the police. He said, ‘No comment’ after each question was put. Members of the jury, this failure to answer police questions may count against him. This is because you may draw the conclusion from his failure that he did not want to allow the police to scrutinise the account given in the prepared statement with their own questions. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it, but you may take it into account as some additional support for the prosecution's case and when deciding whether his case about these facts is true. You may draw such a conclusion against him only if you think it is a fair and proper conclusion and you are satisfied about three things. First, that when he was interviewed, he could reasonably have been expected to answer the police questions. Second, that the only sensible explanation for this failure to do so was that he had no answers that would stand up to the scrutiny of police questioning. And, third, that apart from his failure to answer the police questions, the prosecution's case against him is so strong that it clearly calls for an answer by him.”

THE APPEAL

The Court of Appeal allowed the appeal and quashed the conviction. The end sought to be procured by section 34(1)(a) of the 1994 Act was no more than the early disclosure of a suspect's account and not, separately and distinctly, the subjection of that account to the test of police cross-examination in interview. Where a defendant had made a prepared statement at interview, giving a full account from which he did not depart at trial, there was no room for an adverse inference to be drawn against him.

26.10 The danger of submitting prepared statements, is that the accused may discover at the trial that he has accidentally omitted to mention something significant, which might then be subject to a s.34 direction if he relies on facts he has not previously mentioned.

26.11 ***R. v. Turner*** **[2004] 1 All ER 1025**

THE ALLEGED FACTS

Dwaine Turner was alleged to have driven his two co-defendants to a flat where all three jointly attacked the complainant.

THE POLICE INTERVIEW

When he was interviewed by the police, Turner declined to answer any of the questions but read out a pre-prepared statement.

THE TESTIMONY AT THE TRIAL

This statement broadly accorded with his account in evidence at trial on a charge of wounding with intent to cause grievous bodily harm, that he did not inflict any injuries but tried to break up the fight between the complainant and one of the co-defendants.
However, the statement was inconsistent with his evidence as to the purpose of his visit to the flat and whether he was aware of any of his co-defendants carrying a weapon.

THE APPEAL

He was convicted and contended on appeal that in directing the jury, the judge wrongly stated that a s.34 inference could be drawn from his silence in the interview, when it could only have been drawn from his failure to mention facts.

Held, allowing the appeal, that there was a basic deficiency in the judge's direction to the jury in that by emphasizing that the prepared statement was not a substitute for answering questions in interview, he gave the jury the message that it was the failure to answer questions that could justify the drawing of an inference under s.34, whereas the crucial issue was whether the appellant relied on matters at trial that he had not mentioned in the statement when he could reasonably have been expected to have done so; and that, accordingly, there was a real risk that the jury drew an adverse inference from the fact of the failure to answer questions alone.

Per curiam: Where there are differences between what a defendant says in a pre-prepared statement and the evidence he gives at the trial, it may be that the jury would be better directed to consider a difference as constituting a previous lie, rather than as the foundation for a s.34 inference. It will depend on the precise circumstances.

Statement of fact

26.12 The Act only covers statements of fact, not theories, speculation or opinion.

26.13 ***R. v. Nickolson*** **[1999] Crim LR 61**

The defendant, who was charged with sexual offences against the complainant in her house, offered a theory at the trial as to how his seminal fluid might have got onto her nightdress.

It was held that this did not amount to a statement of fact.

26.14 However, where a speculation is based on a fact, s.34 might apply if the defendant could reasonably have been expected to mentioned both the fact and the speculation when questioned.

26.15 ***R. v. B. (MT)*** **[2000] Crim LR 181**

THE ALLEGED FACTS

The appellant was convicted on three counts of rape relating to his 14-year-old quasi-stepdaughter (S) and two counts of unlawful sexual intercourse with a girl under 16 relating to a 15-year-old school friend of S (D). He was sentenced to five years' imprisonment.

THE POLICE INTERVIEW

During interview the appellant was unable to put forward any motive for the two girls to "make up" the allegations against him.

However, S herself provided a motive during her evidence at trial: she said that she hated the appellant, that she did not like him living with her mother and that he had come between her and her mother. S also gave evidence of an incident where she had entered her mother's bedroom whilst the appellant and her mother were engaged in sexual activity and had called her mother a slag and a tart. S went on to say that she did not like the fact that a sexual relationship existed between the appellant and her mother.

THE TESTIMONY AT THE TRIAL

In examination-in-chief the appellant said that he thought that S was jealous and that she did not like him being in a relationship with her mother.

THE JUDGE'S DIRECTION TO THE JURY

The judge gave the jury directions upon the Criminal Justice and Public Order Act 1994, s.34. He told them that they could draw an adverse inference against the appellant if they were sure that he could reasonably have put forward the jealousy motive at the time of his interview.

THE APPEAL

The appeal was allowed and the convictions were quashed.

Although in ***R. v. Nickolson*** [1999] Crim LR 61, the court held that a theory, a possibility or a speculation was not a fact for the purposes of section 34, that was not a complete answer. If the appellant did not know that the complainant was jealous of his relationship with her mother at the time of the interview, then he could not have been expected to mention that "fact" when questioned.

On the other hand, if he did know and that knowledge was based on some specific incident, then such a motive would be based on fact and he could reasonably have been expected to mention both it and the causative event in interview.

However, in the instant case, the prosecution had not asked the appellant in cross-examination whether he knew of the way S felt about him at the time of the interview and therefore they could not show that his answer was not mere speculation.

Relied on in his defence…

26.16 The facts about which the accused had remained silent at his interview must then be 'relied on' by him at the trial in his defence in order to raise the s.34 inference. However, the evidence thus 'relied on' may not come directly from the accused. It may be that his barrister calls witnesses to give evidence on his behalf (e.g. to provide an alibi) which the accused did not mention when questioned by the police. Such evidence would clearly fall within the ambit of s.34.

26.17 This issue was discussed in the House of Lords in ***R. v. Webber*** [2004] 1 WLR 404.

R. v. Webber **[2004] 1 WLR 404 (HL)**

The certified question for the House of Lords was: "Can a suggestion put to a witness by or on behalf of a defendant amount to a fact 'relied upon in his defence' for the purpose of section 34 of the Criminal Justice and Public Order Act 1994 if that suggestion is not adopted by the witness?" The short answer was: "Yes!"

Robert Webber appealed against a decision to uphold his conviction for conspiracy to murder and possession of a firearm with intent to endanger life.

During police interviews, Webber had either denied any involvement with the offences or simply refused to answer questions put to him. He also declined to give evidence at trial.

Webber maintained that the trial judge erred in giving a direction under the Criminal Justice and Public Order Act 1994 s.34, as that provision could not apply when the matters which Webber had failed to mention were matters put to — but not accepted by — prosecution witnesses, or were matters in relation to which evidence had been given by a co-defendant which Webber had then adopted.

Held, dismissing the appeal, that the word "fact" as given in s.34 should be given a broad meaning. It covered any alleged fact which was in issue and was put forward as part of the defence case. Thus, a defendant relied on a fact or matter not only when he gave or adduced evidence, but also when counsel, acting on his instructions, put a specific case to prosecution witnesses, as opposed to merely testing the prosecution case.

If a trial judge was unsure as to whether counsel was testing the prosecution evidence or advancing a positive case, he should consult with counsel in the absence of the jury, since it could affect the direction to be given. Where, as in the instant case, Webber's counsel had adopted the evidence given by a co-defendant, Webber had relied on that matter in his defence and so rendered s.34 applicable.

A fact which, in the circumstances existing at the time, the accused could reasonably have been expected to mention.

26.17 The fact relied on must be one "which in the circumstances existing at the time, the accused could reasonably have been expected to mention when so questioned, charged or informed."

26.18 "The circumstances existing at the time" include the particular characteristics of the accused.

26.19 ***R. v. Brian Argent*** **[1997] 2 Cr. App. R. 27** (above at para 4.2)

"The courts should not construe the expression "in the circumstances" restrictively: matters such as time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant. When reference is made to "the accused" attention is directed not to some hypothetical, reasonable accused of ordinary phlegm and fortitude but to the actual accused with such qualities, apprehensions, knowledge and advice as he is shown to have had at the time…

"*Like so many other questions in criminal trials this is a question to be resolved by the jury in the exercise of their collective common-sense, experience and understanding of human nature.*

"Sometimes they may conclude that it was reasonable for the defendant to have held his peace for a host of reasons, such as that he was tired, ill, frightened, drunk, drugged, unable to understand what was going on, suspicious of the police, afraid that his answer would not be fairly recorded, worried at committing himself without legal advice, acting on legal advice, or some other reason accepted by the jury." per Lord Bingham CJ

26.20 ***R. v. Howell*** **[2005] 1 Cr App R 1 (CA)**

"What is reasonable depends on all the circumstances. We venture to say, recalling the circumstances of this present case, that we do not consider the absence of a written statement from the complainant to be good reason for silence (if adequate oral disclosure of the complaint has been given), and it does not become good reason merely because a solicitor has so advised. Nor is the possibility that the complainant may not pursue his complaint good reason, nor a belief by the solicitor that the suspect will be charged in any event whatever he says.

"The kind of circumstance which may most likely justify silence will be such matters as the suspect's condition (ill-health, in particular mental disability; confusion; intoxication; shock, and so forth — of course we are not laying down an authoritative list), or his inability genuinely to recollect events without reference to documents which are not to hand, or communication with other persons who may be able to assist his recollection." per Laws LJ at para 24

27 FOLLOWING LEGAL ADVICE TO REMAIN SILENT

27.1 A particular issue has arisen in relation to defendants who claim that the reason they did not answer the questions in the police interview was because their solicitor advised them not to do so.

27.2 In *R. v. Betts and Hall*, the Court of Appeal emphasised that there is a difference between a defendant who genuinely does not answer questions because he is following his solicitor's advice not to do so; and one who is just using the solicitor's advice to evade awkward questions to which he has no exculpatory answer.

The Court of Appeal also provided a model direction for the judge to give in these circumstances.

27.3 ***R. v. Raymond Christopher Betts and John Anthony Hall*** **[2001] 2 Cr. App. R. 16**

THE ALLEGED FACTS

The prosecution case was that on January 25, 1999, two armed men - Raymond Christopher Betts and John Anthony Hall - attacked a man called Nigel Caris, breaking his arm, and then stole money from him. Mr Caris picked out the appellants as his attackers on identification parades. The prosecution further relied on evidence that one of the two attackers called the other "Bettsy" and on evidence that Hall had a possible motive.

The defence of each man was a denial of any involvement and accordingly the issue for the jury was whether Mr Caris's evidence as to the circumstances of the attack and his identification of the attackers.

THE POLICE INTERVIEW

Both appellants denied involvement in the attack and did not answer further questions by the police in the interview, on advice from solicitors.

Raymond Betts' Interview

Betts was at the time 17. He said that he knew nothing about the assault and that he had done nothing like that. Asked if he had been to the scrap yard that year (a period of five or six weeks), he said that he could not remember. He claimed that he had got a very bad memory. He agreed that he was called Bettsy, but said that was a common nickname for people called Betts.

After some further questions his solicitor sought and obtained an opportunity to consult further with his client. When the interview resumed, his solicitor made clear that Betts would exercise his right not to answer further questions. He was asked about Nigel Caris, Alison Redman, Jason Wilson and the appellant Hall and the allegations were put to him, but as indicated by his solicitor he chose to say no more. He was reinterviewed after he had been picked out on the identification parade and he then admitted that he did know Mr Caris.

John Hall's Interview

Hall was a man with a speech defect. He chose not to answer questions in the interview at all. His solicitor made clear that this was because of advice that he had tendered, since he considered that the police had not sufficiently disclosed the material in their possession.

THE TESTIMONY AT THE TRIAL

Both defendants gave evidence at the trial, raising matters that they had not mentioned when being questioned. Both claimed that they had good reason not to answer the police's questions.

- Betts said that he had made no comment because of the advice that he had been given by his solicitor.

- Hall also said that he had been given advice not to answer the questions, but added that he would have been unable to answer the questions in any event because of his speech impediment.

THE JUDGE'S DIRECTION TO THE JURY

"So you may ask yourselves, ladies and gentlemen, well what was it that they now rely on in court? Well I cannot give you a list of all the things that they have relied on in court, because it would be a rather long list, but I can highlight, I think five things in particular which they now rely on in court, none of which were mentioned in any interview.

"First of all, that the defendant Mr Betts says that he knows Mr Caris well, and that Mr Caris knows him and that Mr Caris would recognise him. Now that is a fact Mr Betts now relies on in court.

"Secondly, in the case of Mr Hall, he relies on the fact that he does not know Mr Caris, and that Mr Caris does not know him, and that, therefore, there can have been no recognition between Mr Caris and Mr Hall. That is another fact which Mr Hall relies on, again not mentioned in interview.

"Thirdly, Mr Hall relies on the fact now, does he not, that he knows a man called Jason Wilson. He knows that Mr Caris was Jason Wilson's best friend, and he knows that Mr Caris had an affair with Jason Wilson's wife, Mrs Wilson. Again, he relies on those facts in his defence, but he did not mention them in any interviews.

"Fourthly, there is, is there not, a connection between both these defendants and Messrs Caris and Wilson, because Mr Hall is friendly with Mr Betts, and Mr Hall knows Jason Wilson and he knows of the relationship between Jason Wilson's wife, and Mr Caris. So there is a connection between, as Mr Graham put it, the four players in this case, and that connection again was not mentioned in any interviews.

"Fifthly, it is also relied upon by the defence, or suggested by the defence now, that Mr Caris has a grudge against Hall, because Mr Hall it was who tipped Mr Wilson about the affair, and has a grudge against Hall, and indeed his friend Mr Betts, and is falsely alleging he was assaulted by them in the Century Salvage yard. That is the defence case now. Again, that was not mentioned in the interviews which you have got before you.

"The prosecution say simply, ladies and gentlemen, that the defendants declined to reveal all these matters which they now rely on, because they wanted to hide the connection between them and Mr Caris and Mr Wilson in the hope that the police would never discover any connection between them and Mr Caris and Mr Wilson and that they did that because they are guilty of this assault and that there can be no other logical reason why they should behave in that way. That is what the prosecution says about it, and that is the inference that they ask you to draw from their failure to answer these questions.

"Well the defendants say that that, first of all, is not the right inference to draw. Secondly, that there were, so far as they are concerned, good reasons, or valid reasons, why they did not answer questions in interview.

"First of all, they said their solicitors, or legal representatives, advised them not to answer these questions, on the grounds of there having been inadequate disclosure of the facts of the offence.

"Secondly, it is advanced, is it not, by Mr Hall that he finds it quite difficult to answer questions anyway, because he has a speech impediment.

"Well, first of all, ladies and gentlemen, the defendants are not entitled to shield behind their solicitors' advice. They are both, as it were, adults and grown men and it is for you to consider whether they were able to decide for themselves what to do when being questioned about these matters. It was for them to decide, having received advice from their legal advisers, as to whether they ought to accept that advice, or whether they should not. You are not concerned to decide, I may say, whether you think the solicitors' advice was right or wrong, or whether it was good or bad, but you are entitled to consider the reasons that have been advanced.

"It was suggested that the reason that this advice was given, and the reason the defendants did not answer questions, was because they had not had adequate disclosure of the facts of the case. Well, seeing as that reason has been advanced to you, you are entitled to consider that. They had had disclosure that they were suspected of an offence at a particular time, a certain time on January 25,

that it occurred at a certain place, that it took the form of an assault by two men on to one, that the victim was a man called Nigel Caris. You may ask yourselves, 'Well, was that an adequate disclosure to enable them to answer the questions, what more did they really need to know, if that was what they are being charged with'? Say the Crown, well could they not have just told the truth and said, 'Well, yes we know these people but we do not know anything to do with this offence.'? So, as I say, it is for you to consider, ladies and gentlemen, whether those are valid reasons.

"Now similarly, in the case of Mr Hall, he says that he found it difficult to answer questions, by reason of his speech impediment. Well you have seen him give evidence, and you have seen what the nature of his speech impediment is. It is for you to decide what the nature of his speech impediment is, it is for you to decide whether that is a valid reason for not answering questions in the police station.

"If you consider that the reasons advanced by these defendants are valid reasons why they should refuse to answer questions, then you may not draw any adverse inferences against them. It would not, obviously be right to do so if they have, in your judgment, a good reason or a valid reason not to answer these questions, then do not draw any adverse inferences against them, and simply ignore the fact that they have not answered these questions.

"If, on the other hand, you take the view that the reasons advanced are not valid in your judgment, and it is your judgment that matters about this, and that they have failed to provide an adequate explanation in relation to this matter, well then you may draw such inferences from that as you think are correct. You ask yourselves, what is an inference, or what inferences should we draw. Well, again I go back to what the prosecution suggest you should draw as your conclusion, namely that they wanted to hide the truth and they wanted to hide the connection between the four main players in this case, and that that is, say the prosecution, the action of guilty men who have committed this assault. If you agree that is the proper inference to draw, then you draw it. If you do not think it is the proper inference to draw, well then do not. It is your decision."

THE APPEAL

Following their convictions for causing grievous bodily harm with intent, the defendants appealed *inter alia* because they claimed that the judge had misdirected the jury regarding the operation of s.34.

The Court of Appeal upheld the appeal. Although a defendant cannot hide behind his solicitor's advice as a reason not to answer questions, if that advice is the genuine reason for his silence – rather than the fact that he had no answer to the allegations made by the police – then no inference of guilt should be drawn from his silence at the interview about something he relies on in court. The judge had not made that clear to the jury.

"We are very conscious that directions pursuant to section 34 of the Act are never easy for a trial judge, particularly where reliance is placed on legal advice. In those circumstances, it may be helpful if we set out the sort of direction on this aspect of the case that we believe would have been appropriate in the case:

"Each defendant has told you that he did not answer questions because he was advised by his solicitor that he should not do so as the police had not sufficiently disclosed the information that was available to them. It is not what the solicitors thought that matters. It is what each defendant thought. A person has the choice whether to accept advice or reject it. From the warning that was given at the beginning of each interview, the defendants were aware of the possibility that any failure to mention matters upon which they relied might harm their defence at their trial. You have to take those circumstances into account, along with all the other circumstances including in the case of Betts, his age and in the case of Hall the extent of his speech impediment as you find it to be, in deciding whether each defendant could reasonably be expected to mention at that stage those matters upon which he subsequently relied.

"If you think in either case that the reasons that the defendant gave may be the true explanation for his failure to mention these matters, then you may not hold his failure against him nor draw any adverse inference from the failure. If, on the other hand you are satisfied that the true explanation for either defendant's failure is that he did not at that time have any answer to the allegations that were being put to him, or that he realised that such explanation as he had would not at that stage stand up to questioning or investigation by the police and that the advice of the solicitor did no more than to provide him with a convenient shield behind which to hide, then and only then can you draw such inferences as you consider proper from his failure."

27.4 However, even if an accused is following his solicitor's advice in good faith, it might still not be reasonable for him to remain silent. The test is objective.

27.5 ***R. v. Hoare (Kevin) and Pierce (Graham)*** **[2005] 1 WLR 1804**

THE ALLEGED FACTS

Hoare and Pierce appealed against their convictions for conspiring to supply a class B drug, namely amphetamine. Hoare, who lived on a remote farm from where he ran a glass making and chemical supply business, had been placed under the surveillance of the police, who suspected him of manufacturing amphetamine there.

He was observed delivering a box to Pierce, which, upon Pierce's arrest shortly afterwards, was found to contain amphetamine. Hoare was arrested a short time later.

THE POLICE INTERVIEW

Both men were questioned following arrest but gave "no comment" interviews on their solicitors' advice to remain silent.

THE TESTIMONY AT THE TRIAL

At trial, they both contended that they had not been aware that the substances in question were amphetamine.

THE JUDGE'S DIRECTION TO THE JURY

The trial judge directed the jury, under the Criminal Justice and Public Order Act 1004 s.34, that they could draw an adverse inference from Hoare and P's silence if they felt that it had not been reasonable for the men to rely on their solicitors' advice.

THE APPEAL

Hoare and Pierce argued that the judge had wrongly set out to the jury an objective test of reasonableness rather than a subjective test of whether they had genuinely followed the advice.

Held, dismissing the appeals, that reliance on the advice of a solicitor was not enough in itself to prevent an adverse inference being drawn from silence at interview. Even where the advice was in good faith and the reliance on it genuine, an inference could still be drawn if the jury felt that the true reason for the silence was because the accused had either had no explanation or no satisfactory explanation to give.

Thus, the test was overall an objective one that had to take account of all the circumstances of the case, including what was in the mind of the accused. The judge's use of the term "reasonable" was therefore permissible and in accordance with the current line of authority which all essentially advocated the same test.

THE IMPACT OF THE ECHR

27.6 **ARTICLE 6 (1)**

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

27.7 The right to silence is not mentioned in Article 6, and is not absolute, so it is not necessarily a violation of Article 6 to draw inferences from silence when the interview of the accused is otherwise properly conducted.

27.8 However, it is a violation of Article 6 if a judge fails to direct the jury to consider whether the defendant's reason for remaining silent on legal advice was genuine.

27.9 ***John Murray v. United Kingdom*** **[1996] 22 EHRR 29**

John Murray was arrested after being found in a house in which an IRA informer, L, had been held captive.

On being taken for police questioning M was refused access to a solicitor for 48 hours.

John Murray chose to remain silent during a number of police interviews, despite being warned that adverse inferences might be drawn at trial from his silence. He was convicted of aiding and abetting the false imprisonment of L and sentenced to eight years' imprisonment.

The trial judge exercised his discretion under the Criminal Evidence (Northern Ireland) Order 1988 Art.4 and Art.6 to draw adverse inferences from the fact that M refused to account for his presence at the house.

When Murray's appeal against conviction was dismissed, he lodged an application with the European Commission of Human Rights who referred the case to the European Court of Human Rights.

Held, that (1) by 14 votes to five, an accused's right to silence was not absolute in the sense that no adverse inferences could ever be drawn at trial from that silence. It was a matter for the court in every case to determine what weight should be given to the fact that an accused had chosen not to offer an explanation of the circumstances of his case and to determine whether there had been improper compulsion on the part of the authorities.

Having regard to all the evidence in the instant case, it could not be concluded that the drawing of reasonable inferences infringed M's rights under the European Convention on Human Rights 1950 Art.6(1).

However, having regard to the scheme under the 1988 Order, it was imperative in the interests of fairness for an accused to have access to a lawyer at the initial stages of police questioning. The refusal of the police to grant M access to a solicitor during the first 48 hours of his detention was therefore in breach of Art.6(1) read with Art.6(3)(c).

27.10 ***Condron v. United Kingdom*** **(2001) 31 EHRR 1**

WC and KC were convicted of drug related offences, following a jury direction by the trial judge stating that they had the option of drawing an adverse inference from silence during police interview. Their solicitor, believing them to be suffering from heroin withdrawal symptoms, had advised them to say nothing.

WC and KC were found guilty, and whilst the Court of Appeal considered the direction to be flawed, it did not find the conviction to be unsafe.

C complained to the European Court of Human Rights contending that he did not receive a fair trial within the meaning of the European Convention on Human Rights 1950 Art. 6.1.

Held, allowing the application, that C had not received a fair trial under Art. 6.1 as the jury should have been directed that if the silence could not be attributed to C having no answer, or none that would stand up in cross examination, no adverse inference should be drawn. The reason for the silence, if proffered, and its plausibility should have been taken into account.

27.11 ***R. v. Beckles*** **[2005] 1 WLR 2829**

On 23 May 1997 at the Central Criminal Court before Judge Pownall QC and a jury, Keith Anderson Beckles, was convicted of two counts of robbery, one count of false imprisonment and one count of attempted murder.

He was sentenced to six years' imprisonment, concurrent, on each count of robbery, three years' imprisonment, concurrent, on the count of false imprisonment and nine years' imprisonment, consecutive, on the count of attempted murder, making a total of 15 years' imprisonment.

THE ALLEGED FACTS

On 3 January 1996, Mohamoud Abdi Mohammed spent the day selling khat (a stimulant leaf) in the Upton Park area of London. At about 9.30 pm he met Michelle Whyte, a prostitute. She proposed that they should go back to her flat for sex, which would cost £20. Mohamoud, who had takings of about £90 with him at the time, agreed. They took a cab to a flat owned by Rudolph Montague but used by Whyte for such purposes, in Hackney. Present in the flat were several people including Montague and Keith Beckles.

Mohamoud was searched at knife-point by Montague, whilst Whyte and Beckles held him. Montague found £40 and left the premises to buy drugs. Mohamoud was prevented from leaving the premises by Beckles.

Montague returned to the flat with crack cocaine and this was smoked.

Mohamoud was then searched for a second time. He was held down by Beckles (who was in possession of a hammer at the time) while Whyte searched him, finding more money in a purse tucked between Mohamoud's shirt and vest. Mohamoud was then kept in the flat until he was allegedly thrown out of a window by Montague and Beckles. Mohamoud landed on the ground below. He could not move his lower body and attracted attention by throwing stones at a ground floor window.

An ambulance was called to the scene and at 2.50 a m on 4 January 1996, Mohamoud was taken to the Royal London Hospital. He had seriously injured his spinal cord and was and remains completely paralysed from the waist down. He will be a complete paraplegic for the rest of his life.

THE POLICE INTERVIEW

Three weeks later, Beckles was arrested. On his way to the police station he said that he could tell the officers everything and that the victim had not been pushed but had jumped. When he arrived at the police station, he was advised by a solicitor not to answer questions when interviewed. He followed that advice.

The victim then identified Beckles as one of those who had thrown him out of the window.

Subsequently, at a second interview, Beckles said that he was told that the victim had jumped out of the window. He went to have a look and saw him lying on the grass. He then left the flat because he was scared and thought the victim might be dead.

THE JUDGE’S DIRECTION TO THE JURY

At his trial on charges of robbery, false imprisonment and attempted murder, Beckles gave evidence in line with the account he gave at the second interview.

Pursuant to section 34 of the Criminal Justice and Public Order Act 1994, the judge directed the jury that, if they saw fit, they were entitled to draw adverse inferences from the defendant's silence at his first interview with the police. The defendant was convicted.

THE APPEALS

Beckles’ appeal against conviction was dismissed.

He then applied to the European Court of Human Rights, which ruled that the trial judge's direction to the jury as to their right to draw adverse inferences from the defendant's silence at interview was a misdirection, because the judge had failed to direct them to consider whether the defendant's reason for remaining silent on legal advice was genuine.

That misdirection amounted to a violation of the defendant's rights under article 6(1) of the European Convention on Human Rights. On this basis, Beckles applied to the Criminal Cases Review Commission who referred his case to the Court of Appeal.

The Court of Appeal upheld the appeal, quashed the conviction as unsafe and ordered a retrial.

J THE RULE AGAINST HEARSAY

28 INTRODUCTION TO HEARSAY

28.1 The rule against hearsay is one of the great exclusionary rules of evidence. The reasons for the rule are derived both from efficiency and from principle.

28.2 From the point of view of the most effective evidence, out-of-court statements which cannot be tested on cross-examination risk mistake, false recollections, ambiguity and insincerity.

28.3 On the question of principle, there are two aspects to the exclusion.

i) Such statements have not been made on oath in open court.

ii) It has been argued that the rule against hearsay protects what, in the US constitution, is known as the 'right to confrontation' – the right to confront one's accuser. This has never been fully acknowledged in English common law, but it should be noted that Article 6 of the ECHR refers to the right of defendants to examine – or have examined – witnesses called against them.

28.4 The common law exceptions to the hearsay rule in criminal cases have been supplemented by the Criminal Justice Act 2003, which specifically preserves much of the old law. There are, therefore, now many exceptions to the rule. In civil cases, the rule has simply been abolished!

29 HEARSAY: POLICY AND PRACTICE

29.1 The Criminal Justice Act 2003 moves away from the strict common law rule against the admission of hearsay evidence in criminal proceedings. The current policy is more flexible and promotes the inclusion of relevant hearsay evidence, on the basis that justice is not served if important information is excluded for no good reason. The weight to be attached to hearsay evidence is a matter for the jury or magistrates' court.

29.2 Article 6(3) (d) of the European Convention on Human Rights states that a person charged with a criminal offence has a right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

29.3 ***Al-Khawaja and Tahery v UK*** **[2012] 54 EHRR 23**

The European Court of Human Rights held that a conviction based solely or decisively on evidence adduced from an absent witness does not automatically amount to a breach of the Convention. However, such cases must be subject to "the most searching scrutiny."

29.4 The question for the court is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place.

29.5 The safeguards contained in the Criminal Justice Act 2003, supported by those in section 78 of the Police and Criminal Evidence Act 1984 and the common law, are in principle, strong safeguards designed to ensure fairness. If trial courts apply these properly and have regard to this Grand Chamber judgment and the decision of the Supreme Court in *Horncastle*, trials will be fair.

29.6 The modern leading case about the policy of the hearsay rule and its exceptions is *R. v. Horncastle* (*R. v. Marquis; R. v. Carter*), which was a conjoined appeal to the Supreme Court in 2009.

The Supreme Court held that it did not conflict with Article 6 for a conviction to be based solely or to a decisive extent on hearsay evidence, despite this apparently conflicting with a rule from the European Court of Human Rights, which states that hearsay should not be the sole and decisive reason for a conviction. However, the court will still generally look for other corroborating evidence to ensure fairness.[16]

[16] See for example *R. v. Allcie Houler* [2019] EWCA Crim 1064.

29.7 ***R. v. Horncastle*** **[2010] 2 AC 373**

Horncastle's Case

On 29 November 2007, in the Crown Court at Liverpool, Christopher Horncastle and David Lee Blackmore, were convicted of causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861.

On 30 November 2007, Horncastle was sentenced to imprisonment for public protection with a specified minimum term of 6 years and Blackmore was sentenced to 12 years' imprisonment.

They each appealed against conviction on the grounds that the judge had wrongly allowed the admission into evidence of the written statement of the complainant who had died before the trial.

Marquis' Case

On 12 May 2008, in the Crown Court at Nottingham, Joseph David Graham, pleaded guilty to dangerous driving and assault with intent to resist arrest.

On 20 May 2008, in the Crown Court at Nottingham, he and Abijah Marquis were convicted of kidnap.

On 24 July 2008, Marquis was sentenced to imprisonment for public protection with a specified minimum term of 10 years and Graham was sentenced to imprisonment for public protection with a specified minimum term of 5 years.

They each appealed against conviction on the grounds that their convictions were based to a decisive extent on hearsay statements, in contravention of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Carter's Case

On 22 October 2008, David Michael Carter, was convicted of ten counts of distributing indecent photographs of children, contrary to section 1(1)(b) of the Protection of Children Act 1978 . On 28 November 2008, he was sentenced to concurrent terms of 18 months' imprisonment on each count.

He appealed against conviction on the grounds that the judge had wrongly allowed the admission in evidence of a hearsay document where there was no evidence as to its reliability.

THE JUDGMENT

The Supreme Court dismissed all the appeals.

Although the domestic court was required to take account of the jurisprudence of the European Court of Human Rights in applying principles which were clearly established, where, on rare occasions, the domestic court was concerned that the European Court's decision insufficiently appreciated or accommodated particular aspects of the domestic process, it might decline to follow the decision. The present cases came within that category.

The 2003 Act represented a crafted code enacted by Parliament, which regulated the admission of hearsay evidence at trial in the interests of justice and contained specific safeguards which did not include a "sole or decisive" rule and rendered such a rule unnecessary. The statutory code struck the correct balance between ensuring the fairness of the defendant's trial and protecting the interests of the victim in particular, and society in general, that a guilty person should not be immune from conviction where a witness who had given critical and apparently reliable evidence in a statement was unavailable through death or some other reason to be called at trial.

Although the European court had recognised the need for exceptions to the strict application of article 6(3)(d), since it had approved such exceptions largely in the context of continental procedures which did not address the aspect of a fair trial guaranteed by article 6(3)(d), its resulting jurisprudence lacked clarity. The "sole and decisive" rule, which had been introduced into its jurisprudence without explanation of the underlying principle or full consideration of whether its imposition was justified as applicable equally to the continental and common law jurisdictions, would create severe practical

difficulties if applied to English criminal procedure and the European court had not established that its introduction was necessary.

It was not right for the domestic court to require such a rule to be applied rather than the provisions of the 2003 Act, interpreted in accordance with their natural meaning; and that, so long as those provisions were observed, there would be no breach of article 6 and, in particular article 6(3)(d), if a conviction were based solely or to a decisive extent on hearsay evidence.

30 WHAT IS HEARSAY EVIDENCE?

30.1 Historically, hearsay evidence could be broken down into four parts

i. An oral or written statement;
ii. Made out of court;
iii. Repeated in court;
iv. To prove the truth of the matter stated out of court.

30.2 Examples include:

i. A witness repeating at court what he has been told by another person;
ii. A witness statement being read out in evidence at court, rather than the witness attending court to give oral evidence;
iii. A business document being produced in evidence.

31 THE RULE AGAINST HEARSAY EVIDENCE

31.1 Prior to the Criminal Justice Act 2003, there was a general common law rule that hearsay evidence was inadmissible in criminal proceedings.

31.2 Hearsay evidence was deemed to be 'second-hand' evidence because it was repeating something that had been said elsewhere, and the maker of the original statement could not therefore be cross-examined on its contents.

31.3 This general rule was subject to a number of exceptions, contained both in the common law and in a number of statutes. The CJA abolished the common law rule and put in place a statutory framework under which hearsay evidence may be admissible if it satisfies certain requirements. However, some of the common law exceptions to the rule were specifically preserved.

31.4 One way for the parties to avoid the rule against hearsay is to establish that the evidence they wish to rely on in court is not, in fact, hearsay according to the statutory definition. Statements by third parties not present in court are not always hearsay, and if they are not, they will only be deemed inadmissible if they fall foul of the other exclusionary rules (e.g. because they are irrelevant or unduly prejudicial).

32 THE STATUTORY DEFINITION OF HEARSAY EVIDENCE

THE STATUTORY DEFINITION

32.1 **Criminal Justice Act 2003, s.114 (1)**

Admissibility of hearsay evidence

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any *matter stated* if, but only if—

(a) any provision of this Chapter or any other statutory provision makes it admissible,

(b) any rule of law preserved by section 118 makes it admissible,

(c) all parties to the proceedings agree to it being admissible, or

(d) the court is satisfied that it is in the interests of justice for it to be admissible.

32.2 Hearsay is thus 'a statement, not made in oral evidence, that is relied on as evidence of a matter in it.'

e.g. Garth is charged with handling a stolen bike. At Garth's trial, the CPS calls Adam to give evidence. Adam tells the court: "Garth showed me a bike. He told me he had just been given it by a mate of his, who had nicked it from somewhere else."

This is hearsay evidence because the CPS will rely on the statement made by Garth to Adam to show that he was in possession of a bike which he knew to be stolen. The statement by Garth is being relied on as evidence of a matter stated in it.

*'*A STATEMENT'

32.3 A 'statement' is defined in s.115.

Criminal Justice Act 2003, s.115(2)

A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.

'EVIDENCE OF ANY MATTER STATED'

32.4 The statement must be made with the purpose of getting the addressee to believe it.

Criminal Justice Act 2003, s.115(3)

A *matter stated* is one to which this Chapter applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been—

(a) to cause another person to believe the matter, or

(b) to cause another person to act or a machine to operate on the basis that the matter is as stated.

32.5 ***R. v. Knight*** **[2007] All ER (D) 381**

The defendant was convicted of various sexual offences committed against a 14-year old girl.

At trial, the girl's aunt was permitted to give evidence of entries she had read in the girl's diaries that detailed the girl's sexual contacts with the defendant. The defendant submitted that such evidence was hearsay and should not have been admitted.

The Court of Appeal held that such evidence was not hearsay, because the girl had not intended other people to read the entries in the diary, and it therefore fell outside the scope of s.115.

'A MATTER STATED' AND IMPLIED ASSERTIONS

32.6 The effect of the restricted definition of a 'statement' is to enable evidence to be admitted of what used to be called 'implied assertions' as these are not 'matters stated'.

32.7 This reverses the decision made in *R v Kearley* (1992) 2 AC 228

R v Kearley **(1992) 2 AC 228**

The police answered telephone calls and personal calls to the defendant's home from people asking about drugs that the defendant had for sale. The prosecution wished to adduce the evidence to prove that the intended recipient of the calls was a dealer in drugs, without evidence from the callers themselves. The House of Lords decided that, as evidence of the fact that the defendant dealt in drugs, the caller's words were hearsay and thus inadmissible.

The callers' words would no longer be considered as hearsay, because they do not fall within the definition of being a 'matter stated'. The purpose of the calls was not to cause another person to believe that the recipient of the call was a drug dealer, but simply to request drugs.

32.8 ***R. v. Chrysostomou* [2010] EWCA Crim 1403**

Mark Chrysostomou appealed against his conviction for possessing an imitation firearm with intent to cause fear of violence, and putting a person in fear of violence by harassment.

Chrysostomou had stood outside the house of the victim (V) with an imitation firearm. His case was that he had lent her money and was trying to get it back.

When Chrysostomou's mobile phone was examined, there were four text messages received by him which suggested that he might be a drug dealer. When Chrysostomou gave evidence, he alleged that V took cocaine, and that she had not repaid her debt to him.

The Crown applied to adduce the four texts from Chrysostomou's phone as "bad character" evidence, relying on the gateways under the Criminal Justice Act 2003 s.101(1)(f) and s.101(1)(g). The judge granted the application and concluded, considering s.101(3) of the 2003 Act and the Police and Criminal Evidence Act 1984 s.78, that it was not unfair in the circumstances to permit the evidence to be admitted.

Among the issues for determination were whether the texts constituted hearsay evidence within the terms of the 2003 Act;

HELD: When evidence not in the form of oral evidence in the proceedings was sought to be admitted, there were three preliminary questions that had to be asked:

(a) whether it was relevant;

(b) if so, whether it was a "statement" within the meaning of s.115(2) of the 2003 Act; and

(c) if so, what the purpose was for adducing it in evidence.

In the instant case, it had not been argued that the texts were irrelevant, and the court was prepared to accept that they were "statements".

However, the purpose for which the Crown wished to adduce the texts was not to prove, as fact, any matters stated in them. The object of adducing them was as evidence of an underlying state of affairs, namely that C dealt with drugs and so could meet the demands of the person texting him. The texts were sought to be admitted as evidence of an "implied assertion", therefore they were not caught by the statutory code on hearsay in the 2003 Act and, subject to any other objections to admissibility, could be admitted.

32.9 The leading case on what amounts to hearsay under the Act is *R v. Twist* [2011] EWCA Crim 1143, in which the Court of Appeal gave some useful examples, and discouraged the avoidance of the difficult concept of the "implied assertion", because the CJA 2003 focuses on the 'matter stated' which it is sought to prove.

32.10 The Court of Appeal recommended the following approach

i) identify what relevant fact (matter) it is sought to prove;

ii) ask whether there is a statement of *that matter* in the communication. If no, then no question of hearsay arises (whatever other matters may be contained in the communication);

iii) if yes, ask whether it was one of the purposes (not necessarily the only or dominant purpose) of the maker of the communication that the recipient, or any other person, should believe *that matter* or act upon it as true? If yes, it is hearsay. If no, it is not.

32.11 ***R v. Twist*** **[2011] EWCA Crim 1143**

Four appeals were heard together.

In Andrew Twist's case, Twist was convicted of possession of heroin with intent to supply: he was arrested in possession of a large wrap of heroin worth about £450, and also of a small wrap of the same drug worth about £10. He also had £232 in cash.

Just before his arrest he had driven up in his car and had met and picked up another man by arrangement. The other man was a known heroin user. Twist admitted simple possession of the drugs found on him, but he denied any intent to supply. He contended that his meeting with the other man was nothing to do with drugs, but was because that man owed him money.

The Crown sought to adduce evidence of 24 text messages received on the two mobile phones Twist was using at the time and which contained requests for the supply of drugs. They were received over a period of about five days up to the afternoon of Twist's arrest.

The judge ruled that the messages were not hearsay because any assertion was merely implied and the purpose for which they were relied on was not to prove any fact or matter stated in them.

It was held on appeal that it was not hearsay. The 2003 Act concentrated on the "matter stated" which it was sought to prove. This was defined by reference to the purpose of the maker (usually the sender of the communication). The matter stated had to be something which the maker intended someone (generally the recipient) to believe or to act upon: s.115(3).

Two questions which had to be addressed in most cases were:

(i) what was the matter which it was sought to prove? and

(ii) did the maker of the communication have the purpose of causing the recipient to believe or to act upon that matter?

To say that a communication was evidence of a fact (i.e. tended to prove it) was not the same as saying that that fact was the matter stated in the communication for the purposes of s.115. that it was not.

HUGHES L.J.

9 It is therefore helpful, as it seems to us, that the Act avoids the use of the expression "assertion" altogether, and with it the difficult concept of the "implied assertion". Instead, the Act concentrates the mind on the "matter stated", which it is sought to prove. This is defined by reference to the purpose of the maker (i.e. usually the speaker or sender of the communication). The matter stated must be something which the maker intended someone (generally the recipient, since it is to him that the communication is addressed) to believe or to act upon: s.115(3) .

10 The "matter stated" will usually be a fact, but may also be an opinion: s.115(2) . For convenience we shall refer hereafter to facts, but the same applies where the matter stated is an opinion.

11 There are therefore two questions which have to be addressed in most cases:

i) what is the matter which it is sought to prove? (it must of course be a relevant matter); and

ii) did the maker of the communication have the purpose of causing the recipient to believe or to act upon that matter?

12 In addressing these questions, and the application of the Act generally, it needs to be remembered that to say that a communication is evidence of a fact (i.e. tends to prove it) is not the same as saying that that fact is the matter stated in the communication for the purposes of the Act.

13 If a buyer for a large chain store telephones the sales director of a manufacturer, with whom he routinely does business, and orders a supply of breakfast cereal or fashion jeans he is generally not representing as a fact or matter either: (a) that the sales director's firm manufactures the flakes or the jeans; or (b) that he the buyer works for the chain store. Crucially for the application of the Act, even if

it be suggested that the order should be construed as an "implied assertion" of either fact (a) or fact (b), it will be beyond doubt in most cases that the caller does not have it as one of his purposes to cause the recipient to believe or act upon either of those facts. The recipient knows them very well. Those are simply the facts (or matters) which are common knowledge as between the parties to the call. Neither is, therefore, a matter stated in the call for the purpose of ss.114 and 115 . The call is however evidence of both fact (a) and fact (b). It is not, no doubt, conclusive, at least if there is any realistic possibility of mistake, but it is undoubtedly evidence of those facts. Conversely, if the caller tells the recipient, perhaps in order to induce him to speed up the supply, that the buyers have already sold five tons of the goods, it is his purpose to induce the recipient to believe that fact. If that were the fact sought to be proved, the call would be hearsay evidence of that matter.

14 If there is a queue of young people outside a building at midnight, obviously waiting for an evening out, that is some evidence tending to prove that the building is being operated as a club, which may be the matter which it is sought to prove, perhaps in licensing proceedings. There is no statement of that matter for the purposes of the Act. If several of the queuers were heard to be telling others about last week's "rave", the only way that could possibly be regarded as a statement of the fact that this was a club would be by treating it, artificially as it seems to us, as an implied assertion of that fact. But it makes no difference whether it is so treated or not, because none of the speakers would have the purpose of inducing any listener to believe or to act upon the fact that the place is a club, since that is simply a common basis for conversation, and all of them know it.

Conversely, if the issue is not whether the place was a club, but rather whether there was a large event the previous week, the statement of the fact/matter that there had been such an event would indeed be caught by the hearsay rule; those who spoke of it were doing so with the purpose of inducing their hearers who had not been there to believe it. The out-of-court statement would indeed be hearsay evidence of that matter.

15 Some communications may contain no statement at all. If, for example, the communication does no more than ask a question, it is difficult to see how it contains any statement. A text message to someone asking: "Will you have any crack tomorrow?" seems to us to contain no statement at all. But even if it be analysed as containing an "implied assertion" that the recipient is a drug dealer, that fact is still not a "matter stated" for the purposes of ss.114 and 115(3) because the sender does not have any purpose to cause the recipient to believe that fact or to act upon the basis that it is true. They both know it, and it is the common basis of their communication.

16 Similarly, it is important when applying the statute to distinguish between:

i) the speaker wishing the hearer to act upon his message; and

ii) the speaker wishing the hearer to act upon the basis that a matter stated in the message is as stated (i.e. true).

Only the second will bring into operation the hearsay rules. If the sender asks whether the recipient will have any crack tomorrow, he does indeed want the recipient to act on his message because he hopes to extract an answer to his question. Even more clearly, he does so if he goes one step further and asks for crack to be sold to him tomorrow, because then he hopes to receive a supply. But in neither case does he have the purpose of causing the recipient of his message to believe that the recipient is a drug dealer, or to act on the basis that that is the truth.

17 Generally, therefore, it is likely to be helpful to approach the question whether the hearsay rules apply in this way:

i) identify what relevant fact (matter) it is sought to prove;

ii) ask whether there is a statement of that matter in the communication. If no, then no question of hearsay arises (whatever other matters may be contained in the communication);

iii) if yes, ask whether it was one of the purposes (not necessarily the only or dominant purpose) of the maker of the communication that the recipient, or any other person, should believe that matter or act upon it as true? If yes, it is hearsay. If no, it is not.

18 The answers to these questions will be case-sensitive. The same communication may sometimes be hearsay and sometimes not, depending on the matter for which it is relied upon and the fact which it is sought to prove.

19 In addressing these questions, we would strongly recommend avoidance of the difficult concept of the "implied assertion". That was described by the Law Commission, rightly in our view, as "a somewhat unfortunate expression". As the commission went on to point out: "First, it begs the question of whether the words or conduct in question are an assertion of the fact that they are adduced to prove. It is at least arguable that they are not assertive at all, but directly probative – in which case it would follow that they should not be caught by the hearsay rule.

Second, the word 'implied' is here used in an unusual sense. Normally it refers to a statement which is not expressly spoken or written but is intended to be understood from what is said or done. But where there is an assertion of the fact to be proved, it is immaterial whether that assertion is express or (in the ordinary sense) implied. An assertion of a fact is no less of an assertion because it is implicit in an express assertion of a different fact, or because it takes the form of nonverbal conduct such as a gesture. An assertion can therefore be implied (in the ordinary sense) without being what is described in the context of hearsay as an 'implied' assertion."

As we have sought to explain, it no longer matters whether a statement is analysed as containing an implicit (or "implied") assertion if the speaker's purpose does not include getting anyone else to accept it as true.

EXAMPLES OF HEARSAY EVIDENCE

32.12 Examples of hearsay evidence that commonly arise include:

1. A witness repeating at trial what he has been told by another person;
2. A statement from a witness being read out at trial instead of the witness attending curt to give oral advice;
3. A police officer repeating at trial a confession made to him by a defendant
4. A business document being introduced in evidence at court.

33 STATUTORY CATEGORIES OF ADMISSIBILITY

33.1 Hearsay evidence (as defined above) is admissible in criminal proceedings only if:

1. The 2003 Act or any other statutory provision makes it admissible – s.114 (1) (a); or
2. Any rule of law preserved by section 118 makes it admissible - s.114 (1) (b); or
3. All parties to the proceedings agree to it being admissible – s. 114 (1) (c); or
4. The court is satisfied that it is in the interests of justice for it to be admissible – s. 114 (1) (d).

THE SECTION 114 (1) (d) DISCRETION

33.2 In exercising the discretion under Section 114 (1) (d) the court must have regard to the following (and any others it considers relevant):

- How much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- What other evidence has been, or can be, given on the matter or evidence mentioned above;

- How important the matter or evidence mentioned is in the context of the case as a whole;
- The circumstances in which the statement was made;
- How reliable the maker of the statement appears to be;
- How reliable the evidence of the making of the statement appears to be;
- Whether oral evidence of the matter stated can be given and, if not, why it cannot;
- The amount of difficulty involved in challenging the statement;
- The extent to which that difficulty would be likely to prejudice the party facing it.

33.3 Section 114 (1) (d) will be considered only in cases where admissibility under the other statutory provisions and the retained common law rules is not allowed.

33.4 The test for admissibility is "interests of justice".

The guidelines for the factors to consider in relation to the interests of justice test are detailed. Prosecutors will need to take these factors into account when considering the likely admissibility of evidence that the prosecution propose to call. These will also be the factors to take account of when receiving a notice of intention to adduce hearsay evidence from the defence. The prosecutor will need to decide whether to oppose any notice or agree to admit the evidence.

33.5 The courts have indicated a willingness to use Section 114 (1) (d).

33.6 ***R v Xhabri*** **[2006] 1 Cr. App. R. 26**

The Court of Appeal, when considering an application to admit the previous complaint of a rape victim under s.120, stated that even if the previous complaint fell outside the strict construction of s.120 they would admit the evidence under s.114 (1) (d).

34 CASES WHERE THE WITNESS IS UNAVAILABLE

34.1 Criminal Justice Act 2013, s.116

Cases where a witness is unavailable

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in subsection (2) is satisfied.

(2) The conditions are—

(a) that the relevant person is dead;

(b) that the relevant person is unfit to be a witness because of his bodily or mental condition;

(c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;

(d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;

(e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

(3) For the purposes of subsection (2)(e) "fear" is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.

(4) Leave may be given under subsection (2)(e) only if the court considers that the statement ought to be admitted in the interests of justice, having regard—

(a) to the statement's contents,

(b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence),

(c) in appropriate cases, to the fact that a direction under section 19 of the Youth Justice and Criminal Evidence Act 1999 (c. 23) (special measures for the giving of evidence by fearful witnesses etc) could be made in relation to the relevant person, and

(d) to any other relevant circumstances.

(5) A condition set out in any paragraph of subsection (2) which is in fact satisfied is to be treated as not satisfied if it is shown that the circumstances described in that paragraph are caused—

(a) by the person in support of whose case it is sought to give the statement in evidence, or

(b) by a person acting on his behalf,

in order to prevent the relevant person giving oral evidence in the proceedings (whether at all or in connection with the subject matter of the statement).

34.2 S.116 (2) (b) was recently applied in *R. v. Eljack and Latie* [2019] EWCA Crim 1038

***R. v. Eljack and Latie* [2019] EWCA Crim 1038**

Kuany Eljack, now aged 24, and Khalid Latif, now aged 19, were convicted of one count of wounding with intent, one count of unlawful wounding and one count of robbery. They were each sentenced to a total of eight years' detention at a young offender institution.

On 6 January 2017 the main complainant, John Furman called the ambulance service and told them that he and his friend Mr. Ginova had been stabbed by two people. When the police attended the address, they found that both men had knife wounds. Mr. Furman told police that he had been attacked in his flat by two men. He said that Mr. Ginova had been the principal target for the attack, but that when he endeavoured to intervene he himself was also cut. He told the young men that he would give them money if they stopped attacking Mr. Ginova. The men escorted Mr. Furman to a local cash machine outside a branch of Costcutters, although he said that on the way they assaulted him and punched him several times. He gave them money, he said, because he was scared for his safety.

Neither of the victims were available to give testimony, but the prosecution sought to have their hearsay evidence admitted.

The problem with Ginova is that he could not be found. The judge refused to admit his hearsay evidence because he was not satisfied that all reasonable steps had been taken to locate him.

However, he did permit the statement of Furman to be admitted, as he clearly fell under the provision of s.116 (2) (b), as being unfit to be a witness because of his bodily or mental condition. He had been under the care of Dr Nadia Davies (Consultant Psychiatrist) for the past 10 years, and she had made the following report:

> (a) Mr. Furman is a 55-year-old gentleman who suffers from paranoid schizophrenia and although he has never been formally admitted to a mental health unit in the UK, he constantly struggles to manage his paranoid delusions.
>
> (b) Whilst his anti-psychotic medication partially controls his symptoms, Mr. Furman experiences voices telling him that his phone is bugged and that people intend to harm him in some way.
>
> (c) Mr. Furman's paranoid symptoms are exacerbated by non-compliance with prescribed medication and his periodic use of drugs, namely crack cocaine and heroin.
>
> d) Recently Mr. Furman and a friend who was visiting were physically attacked by two local drug dealers who demanded money from his friend. While trying to defend his friend from a beating Mr. Furman's hand and neck were slashed by a knife. Mr. Furman was then forced to go to a local cash point to withdraw some money to pay his friend's debts.
>
> (e) Mr. Furman understands the nature of the charges against the accused, he understands the purpose of the court proceedings and the role of professionals in the proceedings. He does however have difficulty expressing himself particularly when under stress as he is agitated, fearful of strangers, is distracted by auditory hallucinations and at times has disorganised thinking.
>
> (f) I would consider that although he had the capacity to give a witness statement that he is not fit to give evidence and am concerned that being compelled to give evidence would be detrimental to his mental health.
>
> (g) His symptoms and ability to communicate facts (or his reality as opposed to any paranoid delusions) are greatly assisted when he is accompanied by mental health professionals he knows and trusts.
>
> (h) The difference between when Mr. Furman is referring to a real occurrence and when he is being affected by paranoid hallucinations would be obvious to anyone but especially those who know Mr. Furman and are responsible for supporting him with his mental health problems.

34.3 S.116 (2) (e) was recently applied in *R. v. Allcie Houler* [2019] EWCA Crim 1064, a very short judgment which is reproduced in full below.

***R. v. Allcie Houler* [2019] EWCA Crim 1064**

1. LADY JUSTICE HALLETT DBE, THE VICE PRESIDENT

2. Background

3. On 12 March 2018, the applicant pleaded guilty to possessing an offensive weapon. On 4 April 2018, he was convicted of murder with a minimum term of 25 years. He now seeks to renew his application for leave to appeal.

4. The facts

5. The co-accused, Sylvester and Lewis, the applicant and the deceased, Nico Ramsey, were all involved in class A drug dealing. Sylvester believed that Nico Ramsey had stolen some drugs and sought revenge. Forty minutes before Mr. Ramsey's murder on 13 February 2016, three men, including Sylvester and Lewis, arrived at the home o f a drug addict, Ms Tracey Smith, looking for Mr. Ramsey. The phones of Sylvester and the applicant were in the same area and in the vicinity of Ms Smith's home at the same time. Three men, said to be Sylvester, Lewis and the applicant, then found the deceased, chased him and caught up with him. They beat him to the ground and he was stabbed twice in the chest area. He was dragged along the road and kicked and beaten further.

6. The incident was witnessed by passers-by and, importantly, captured on CCTV. On that footage, the applicant can be seen taking out a knife and making stabbing motions in the area of the deceased's chest. A knife that was linked by forensic evidence to the stabbing and to the applicant was found in a nearby alley.

7. The applicant left the country after the murder and his co-accused were tried without him and convicted. At their trial, the evidence of Ms Smith was admitted as hearsay because the trial judge held that she was in genuine fear for her life and the lives of her children. Sylvester attempted to appeal his conviction on the ground that the hearsay evidence of Ms Smith was wrongly admitted, but his application was refused.

8. The applicant was extradited from Venezuela, to which he had fled, and stood trial alone. At his trial, he admitted it was possible he killed the deceased, but claimed he did not have the intent for murder. He denied going to Ms Smith's house looking for the deceased and insisted he came upon Sylvester and Lewis and the incident by chance.

Ground of Appeal

9. There is one ground of appeal namely that the trial judge wrongly admitted the hearsay evidence of Ms Smith.

10. It is said that Ms Smith's evidence undermined the central plank of the defence: that the applicant was not a party to Sylvester's search for the deceased and had no prior intent to cause any harm, let alone really serious bodily harm.
11. Trial counsel acknowledged that this court in Sylvester's appeal rejected that argument, but insisted that the evidence of Ms Smith affected the applicant's case more than it affected the case of Sylvester and Lewis. They admitted going to her house; he did not.

12. Furthermore, her evidence was described as inherently unreliable. When she provided the information of the visit to her home, Ms Smith understood that it would not be used in court. She could not name the man said to be the applicant, although he had previously supplied her with drugs, her description of him was inaccurate and of his clothing unspecific and she had lied about the presence of her boyfriend at the time of the visit.

13. If, as the applicant asserts, Ms Smith's evidence was pivotal to the Crown case, the admission of her evidence was said to undermine the defence and therefore the fairness of the applicant's trial.

Conclusions

14. The single judge gave full, careful and ample reasons for rejecting the application for leave and we do not intend to repeat them.

15. The evidence of Ms Smith undoubtedly met the requirements of section 116(4) of the Criminal Justice Act 2003, as the trial judge found. He conducted a careful *voir dire*, he applied the correct principles and he provided full and sound reasons for his decision to admit the evidence.

16. In any event, the evidence from Ms Smith was not pivotal to either the defence or the Crown case. The applicant could be put in the area of Ms Smith's house and at the scene by other independent evidence and her evidence paled into virtual insignificance compared to the CCTV footage. The applicant was caught on camera fully participating in a vicious attack by three men on Mr. Ramsey; an attack that left Mr. Ramsey dead. The applicant can be seen stabbing the deceased twice in the chest in a way that led the pathologist to say in his opinion the applicant stabbed the fatal wound. After the incident and as they left the scene, the applicant patted Sylvester on the back in a manner of congratulating him. Unfortunately, his intent to kill or cause grievous bodily harm was all too obvious.

17. For those reasons, we agree with the single judge. The application for leave to appeal against conviction is unarguable and it is dismissed.

35 CASES INVOLVING BUSINESS AND OTHER DOCUMENTS

35.1 Criminal Justice Act 2013, s.117

Business and Other Documents5

(1) In criminal proceedings a statement contained in a document is admissible as evidence of any matter stated if—

(a) oral evidence given in the proceedings would be admissible as evidence of that matter,

(b) the requirements of subsection (2) are satisfied, and

(c) the requirements of subsection (5) are satisfied, in a case where subsection (4) requires them to be.

(2) The requirements of this subsection are satisfied if—

(a) the document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office,

(b) the person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matters dealt with, and

(c) each person (if any) through whom the information was supplied from the relevant person to the person mentioned in paragraph (a) received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office.

(3) The persons mentioned in paragraphs (a) and (b) of subsection (2) may be the same person.

(4) The additional requirements of subsection (5) must be satisfied if the statement—

(a) was prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation, but

(b) was not obtained pursuant to a request under section 7 of the Crime (International Co-operation) Act 2003 (c. 32) or an order under paragraph 6 of Schedule 13 to the Criminal Justice Act 1988 (c. 33) (which relate to overseas evidence).

(5) The requirements of this subsection are satisfied if—

(a) any of the five conditions mentioned in section 116(2) is satisfied (absence of relevant person etc), or

(b) the relevant person cannot reasonably be expected to have any recollection of the matters dealt with in the statement (having regard to the length of time since he supplied the information and all other circumstances).

(6) A statement is not admissible under this section if the court makes a direction to that effect under subsection (7).

(7) The court may make a direction under this subsection if satisfied that the statement's reliability as evidence for the purpose for which it is tendered is doubtful in view of—

(a) its contents,

(b) the source of the information contained in it,

(c) the way in which or the circumstances in which the information was supplied or received, or

(d) the way in which or the circumstances in which the document concerned was created or received.

35.2 The Act deals differently with statements contained in general business documents and statements made in contemplation of criminal proceedings.

35.3 Generally a statement contained in a document is admissible of any matter stated if:

- Oral evidence would be admissible as evidence of the matter;
- The document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office;
- The person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matters dealt with; and
- Each person (if any) through whom the information was supplied from the relevant person to the person creating or receiving the information also received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office (section 117 (2)).

35.4 Documents admissible under these provisions will be wide ranging and include company correspondence, hospital records and a note made by an operator working for a paging company that messages have been left for a customer (*Rock* [1994] Crim LR 843).

35.5 In the case of statements prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation (other than a request under section 7 of the Crime (International Co-operation) Act 2003 - relating to overseas evidence, usually obtained pursuant to a letter of request) then one of the five conditions in section 116 (2) must also be satisfied (see above), or the relevant person cannot reasonably be expected to have any recollection of the matters dealt with in the statement (having regard to the length of time since he supplied the information and all other circumstances) (section 117 (5)).

35.6 Documents where these additional requirements must be met will include statements of fraud investigators and police officer's notes. However, it may be that the information upon which the fraud investigator bases his statement will be admissible, as much of that information may be contained in business documents admissible under section 117 (2).

35.7 The person supplying the information is the relevant person (section 117 (2) (b)). Therefore, the decision in *Bedi* [1992] 95 Cr. App. R. 21, where it was accepted that reports of the loss or theft of credit cards compiled by a bank employee from information supplied by the owners of the cards were 'made' by the employee rather than by the owners of the cards, is reversed. It is now clear that the maker of the statement is the owner of the cards.

35.8 Although admissibility is generally automatic, there is limited discretion given to the court to exclude evidence if satisfied that the statement's reliability is doubtful in view of:

- Its contents;
- The source of the information contained in it;
- The way in which or the circumstances in which the information was supplied or received; or
- The way in which or the circumstances in which the document concerned was created or received (section 117 (7)).

35.9 This provision is of particular importance to the prosecution as it is the only way of challenging the admissibility of business and other documents tendered by the defence. The test is in favour of admissibility rather than in favour of exclusion.

35.10 S.117 was recently applied in *R. v. Johnson* [2019] EWCA Crim 1730.

35.11 ***R. v. Johnson* [2019] EWCA Crim 1730**

Ian Johnson (aged 60) was convicted of indecent assault and sentenced to five-and-a-half year's imprisonment.

In 1998, whilst working as a driving instructor, he told his 17-year-old female student (LA) to drive to a deserted industrial estate, ostensibly to practice parking. Once there, he raped her. She was too frightened of her father's health to report the incident at the time, but in 2016, she saw Johnson in a local store, which caused her to have a panic attack, and she reported the incident of 18 years before.

Her medical records disclosed that in 2002, when she was suffering from depression, she had informed the doctor that she had been attacked by a driving instructor. A further entry in her medical records in 2006 recorded that she had been raped by her driving instructor when she was 17.

At the trial the prosecution sought to adduce hearsay evidence under section 117 of the Criminal Justice Act 2003 of the entries in the medical records. In a written ruling the judge found that they were plainly admissible as evidence to rebut recent fabrication.

The defence had complained that the records had been redacted, but little redaction could be perceived and that which had been omitted was material that was plainly irrelevant.

The judge said that the only discretion in section 117 to exclude the documents was in subsections (6) and (7), which were not relevant, an approach to the makers of the notes could not possibly lead to their recollecting anything, which was a situation envisaged by subsection (5) although that subsection could not apply in this case because of the terms of subsection (4).

The defence appealed *inter alia* on the basis that the hearsay evidence of the medical reports should not have been admitted. However, it was held by the Court of Appeal that the evidence was admissible under s.117 to show consistency and to rebut any suggestion of recent invention by the victim.

"The fifth ground is that the judge erred in admitting as hearsay evidence redacted medical records containing complaints about the applicant and then failing to warn the jury as to the difficulties posed to the defence in challenging that evidence. In our judgment, the judge was clearly correctly to admit what the complainant had told the doctor as recorded in the medical records under section 117 to show consistency and to rebut any suggestion of recent invention. As for the alleged failure to warn about limitations of hearsay evidence, as the single judge said, that direction would only be required if the defence was disputing that LA told the doctor what was recorded but that was not disputed."

per Flaux LJ at para 23.

36 COMMON LAW CATEGORIES

36.1 The CJA specifically preserves certain categories of common law admissibility

36.2 **Criminal Justice Act 2013, s.118**

Preservation of certain common law categories of admissibility

(1) The following rules of law are preserved.

Public information etc

1 Any rule of law under which in criminal proceedings—

(a) published works dealing with matters of a public nature (such as histories, scientific works, dictionaries and maps) are admissible as evidence of facts of a public nature stated in them,

(b) public documents (such as public registers, and returns made under public authority with respect to matters of public interest) are admissible as evidence of facts stated in them,

(c) records (such as the records of certain courts, treaties, Crown grants, pardons and commissions) are admissible as evidence of facts stated in them, or

(d) evidence relating to a person's age or date or place of birth may be given by a person without personal knowledge of the matter.

Reputation as to character

2 Any rule of law under which in criminal proceedings evidence of a person's reputation is admissible for the purpose of proving his good or bad character.

Note: The rule is preserved only so far as it allows the court to treat such evidence as proving the matter concerned.

Reputation or family tradition

3 Any rule of law under which in criminal proceedings evidence of reputation or family tradition is admissible for the purpose of proving or disproving—

(a) pedigree or the existence of a marriage,

(b) the existence of any public or general right, or

(c) the identity of any person or thing.

Note: The rule is preserved only so far as it allows the court to treat such evidence as proving or disproving the matter concerned.

Res gestae

4 Any rule of law under which in criminal proceedings a statement is admissible as evidence of any matter stated if—

(a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded,

(b) the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement, or

(c) the statement relates to a physical sensation or a mental state (such as intention or emotion).

Confessions etc

5 Any rule of law relating to the admissibility of confessions or mixed statements in criminal proceedings.

Admissions by agents etc

6 Any rule of law under which in criminal proceedings—

(a) an admission made by an agent of a defendant is admissible against the defendant as evidence of any matter stated, or

(b) a statement made by a person to whom a defendant refers a person for information is admissible against the defendant as evidence of any matter stated.

Common enterprise

7 Any rule of law under which in criminal proceedings a statement made by a party to a common enterprise is admissible against another party to the enterprise as evidence of any matter stated.

Expert evidence

8 Any rule of law under which in criminal proceedings an expert witness may draw on the body of expertise relevant to his field.

9 With the exception of the rules preserved by this section, the common law rules governing the admissibility of hearsay evidence in criminal proceedings are abolished.

37 RES GESTAE

37.1 ***Res Gestae*** is Latin for 'things done'. It is a peculiar rule which allows hearsay evidence to be admitted if the statement is made during the excitement of – or as part of – the litigated event.

37.2 *Res gestae* do not have to be events that are exactly contemporaneous with the statements.

Where the victim of an attack has informed a witness of what occurred in such circumstances as to satisfy the trial judge that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim so as to exclude the possibility of concoction or distortion and the statement was made in conditions of approximate but not exact contemporaneity, evidence of what the victim said is admissible as to the truth of the facts recited as an exception to the hearsay rule.

37.3 ***R v. Andrews (Donald)*** **[1987] AC 281 (HL)**

THE FACTS

On 13 September 1983 Alexander Morrow, who lived at flat No. 3, Rouple House, London, was attacked and stabbed with two different knives and robbed. Within minutes of the attack, and bleeding profusely from a deep stomach wound, he went downstairs to the flat below for assistance. The police and ambulance were immediately telephoned, and again within a matter of minutes the police arrived, shortly followed by the ambulance. Mr. Morrow had been mortally wounded. He was kept alive on a life-support machine but died two months after this attack.

Both Peter O'Neill and Donald Andrews, were charged with murder. O'Neill pleaded guilty to manslaughter, which plea was accepted by the prosecution. Andrews pleaded not guilty and O'Neill was the prosecution's main witness at Andrews' trial.

O'Neill lived in flat No. 5, on the floor above that of the deceased. He and Andrews had been out drinking that day and returned home in the evening about 8.30 p.m. to his, O'Neill's flat. As they were about to leave the flat a very short while later, Andrews asked if O'Neill had any knives, and when O'Neill told him there were some in the kitchen, Andrews helped himself to a large bread knife and a small potato knife. He also took a blanket from O'Neill's daughter's cot. On the way out, the appellant stopped at the deceased's flat, put the blanket over his and O'Neill's head, handed O'Neill the small potato knife and tried to force the lock of the flat using the bread knife. He failed. He then knocked on the door and when the deceased answered, the appellant shouldered the door open, lunging with the knife, and stabbing the deceased in his chest and stomach.

As the deceased fell down Andrews said, "I am going to finish the old bastard off." O'Neill said he then dropped the potato knife, tried to save the deceased but in the process was stabbed twice in the leg. The cot blanket by this stage had come off their heads. Andrews then ran into the room, came back with the deceased's stereo player, told O'Neill to get the deceased's money and O'Neill took about £4.

They then returned to O'Neill's flat and put the blanket back. They then left, taking with them the two knives and the stereo record player and went to the appellant's flat in Droitwich House. Subsequently, O'Neill was taken by ambulance to hospital to have his wounds dealt with.

THE HEARSAY EVIDENCE

The police, P.C. Worboys and P.C. Hanlon, arrived about 15 minutes after the incident.

P.C. Worboys' main preoccupation was in administering first aid, in particular in stopping blood pouring from the stab wound in the stomach. While he was so doing, he asked the deceased how he had received his injuries. The deceased replied that he had been attacked by two men. He gave the names of his attackers, as being Peter O'Neill from flat 5, Rouple House, and the other, as a man he knew as Donald. He said he had gone to the door of his flat, opened the door and was attacked by these two men.

Mr. Worsley, the barrister for the prosecution, sought to have the statement of the deceased admitted as evidence of the truth of the facts that he had asserted, namely that he had been attacked by both O'Neill and the appellant. Since evidence of this statement could only be given by a witness who had merely heard it, such evidence was clearly hearsay evidence.

The *res gestae* doctrine

Mr. Worsley based his submission that this hearsay evidence was admissible upon the so-called doctrine of "res gestae." He could not submit that the statement was a "dying declaration" since there was no evidence to suggest that at the time when the deceased made the statement (two months before his ultimate death), he was aware that he had been mortally injured.

It was held that there was sufficient proximity in time for the doctrine to apply, all other conditions relating to the reliability of the statement being satisfied.

LORD ACKNER

My Lords, may I therefore summarise the position which confronts the trial judge when faced in a criminal case with an application under the res gestae doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorised as "hearsay evidence?"

1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus, the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion… The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.
5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error.

37.5 The doctrine should not be used to avoid calling witnesses to give original evidence when they are actually available**.**

LORD ACKNER

I would… strongly deprecate any attempt in criminal prosecutions to use the doctrine as a device to avoid calling, when he is available, the maker of the statement. Thus, to deprive the defence of the opportunity to cross-examine him, would not be consistent with the fundamental duty of the prosecution to place all the relevant material facts before the court, so as to ensure that justice is done.

37.6 The issue of *res gestae* came up in a recent case in Scotland.

McGaw and Reid v. HM Advocate **[2019] HCJAC 78 (High Court of Justiciary, Appeal Court) (14 November 2019)**

The defendants had been convicted of producing a psychoactive substance, contrary to the Psychoactive Substances Act 2016. They had been producing the drug before it became illegal to do so, and much of the case rested on whether their previous activities were relevant and admissible evidence as to whether they had continued to produce the drug after it became illegal.

Part of the evidence involved WhatsApp messages exchanged between the parties and their clients after the Act came into force, which indicated that they were still in business. The defendant argued that this was hearsay evidence which should be excluded.

It was held that these messages were admissible as *res gestae*.

"Proof of the exchange of WhatsApp messages formed part of the case against each appellant. These messages were not in the same category as evidence of the hearsay of one accused after the commission of a crime and outwith the presence of another accused. The messages were part of the commission of the offence; i.e. res gestae. They were capable of incriminating all of the accused, whether or not the particular accused sent or received the message. They were pieces of evidence which were capable of demonstrating what was going on and who was involved."

per Lord Carloway, Lord Justice General, at para 38

38 MULTIPLE HEARSAY

38.1 Multiple hearsay refers to the situation where information is relayed through more than one person before it is recorded.

38.2 Multiple hearsay is only admissible if:

Either of the statements is admissible under section 117 (business documents) or section 119 (inconsistent statements) or section 120 (other previous statement); or

All parties agree; or

The court uses its discretion to admit under section 121.

38.3 Discretion under section 121 is framed differently to the overall discretion of the court and requires the court to be satisfied that the value of the evidence, taking into account how reliable the statements appear to be, is **so high** that the interests of justice require the later statement to be admissible for that purpose.

38.4 It has been suggested that the discretion in section 121 is to be viewed as a higher test than the discretion in section 114 (1) (d). This is because multiple hearsay is more likely to be unreliable. However, there may still be circumstances where it can be reliable.

39 CREDIBILITY

39.1 The credibility of any witness who does not give evidence can be challenged by admitting evidence relevant to credibility as if the witness were giving the evidence in person (section 124(2)). Another party may be permitted to lead additional evidence to deny or answer any allegation made (section 124 (3)).

40 UNCONVINCING EVIDENCE

40.1 In a trial before judge and jury the judge has the power to direct an acquittal or discharge the jury if after the close of the prosecution case he considers that the case is based wholly or partly on a hearsay statement and that statement is so unconvincing that, considering its importance to the case against the defendant, his conviction would be unsafe (section 125).

40.2 This provision only applies to jury trials on the basis that in these circumstances Magistrates would be bound to acquit.

41 GENERAL DISCRETION TO EXCLUDE EVIDENCE

41.1 The court is given a general discretion to refuse to admit hearsay evidence under the Act if satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it (section 126 (1)).

41.2 The Act also specifically preserves the power of the court to exclude prosecution evidence under section 78 of the Police and Criminal Evidence Act 1984 and any other power to exclude evidence at its discretion (section 126 (2)).

41.3 It should be noted that section 78 relates only to the exclusion of prosecution evidence and the common law rules refer to exclusion if it is necessary to secure a fair trial for the accused. It is submitted that the only discretion to exclude defence evidence is that contained in section 126.

42 EXPERT EVIDENCE: PREPARATORY WORK

42.1 Section 127 creates an exception to the hearsay rule for information relied on by an expert, subject to the court's discretion to require attendance of the relevant witness. A statement prepared for the purposes of criminal proceedings made by a person having personal knowledge of any matter stated can be relied upon by an expert to base an opinion on it.

42.2 It is a requirement that notice be given to the other party that the expert will be basing an opinion or inference on the statement. The notice must provide the name of the person making the statement and the nature of the matters contained in it.

42.3 The issue of expert evidence came up in the recent case of *R. v. Pringle* [2019] EWCA Crim 1722

42.4 ***R. v. Pringle* [2019] EWCA Crim 1722**

James Pringle (aged 20) was convicted of abducting a child, contrary to s.2 (1) (b) of the Child Abduction Act 1984. His 'victim' was a 13-year old schoolgirl, who fancied herself as Pringle's girlfriend, and played truant from school to spend the day with him.

One of the issues raised in the case by the prosecution was that by spending time with the girl, Pringle was in breach of a prohibition contained in a Child Abduction Warning Notice, which had been served on him two days earlier. However, this was not the offence with which he was charged, and the defence (unsuccessfully) argued that it was unduly prejudicial for the judge to have permitted this evidence to be admitted. The court held that it was at least relevant to the issue of whether the defendant knew that he was not permitted to socialise with the girl

There was also an issue about Pringle's learning difficulties, which might have meant that his interview should have been conducted in the presence of an appropriate adult. The defence wished to introduce into evidence a report from an expert intermediary, which indicated the problems that Pringle might have had in understanding the implications of the CAWN.

As this expert was not available for cross-examination, this evidence would have been hearsay, and the court held that it was not admissible as it did not fall within the exception in s.127, as the report had not been prepared for the purposes of the criminal proceedings, but was merely incidental to them.

43 CONFESSIONS

43.1 Section 128 of the 2003 Act inserts section 76A into the Police and Criminal Evidence Act 1984. This enables a defendant to introduce a confession made by a co-defendant subject to his proving (on the balance of probabilities) that the confession was not made by oppression or in circumstances likely to render it unreliable.

43.2 Facts discovered as a result of a confession will still be admissible even if the confession is excluded.

44 REPRESENTATIONS OTHER THAN BY A PERSON

44.1 A statement made by a machine (e.g. a computer), which relies on information supplied by a person, is only admissible to the extent that the information provided was accurate: section 129 (1).

44.2 There is a presumption that a mechanical device has been properly set or calibrated: section 129 (2).

45 RELEVANCE OF HEARSAY EVIDENCE

45.1 Whether or not evidence is hearsay, or whether or not one of the exceptions applies, it must still be **relevant** in order to be admissible. If a report of a third-party statement is being given as evidence *other* than to establish its truth, then it is often not relevant to the case at all.

45.2 ***R. v. Blastland*** **[1986] AC 41**

FACTS

Douglas Blastland, was charged with (count 1) buggery, contrary to section 12 (1) of the Sexual Offences Act 1957. the particulars of offence being that he on 9 December 1982 committed buggery with Karl James Fletcher, a boy aged 12 years; and (count 2) murder, the particulars being that on or about 9 December 1982, he murdered Karl James Fletcher.

The case for the prosecution was that he had forcibly buggered Karl Fletcher and then strangled him with a scarf. He pleaded not guilty.

He gave evidence that he had attempted to bugger the boy but had desisted when the boy had complained of pain. Shortly afterwards, he had seen a man called Mark nearby and, afraid that he had been seen committing a serious offence, had run off and returned to his home.

His case was that it had been Mark, not he, who had committed the offences with which he was charged. He sought to call a number of witnesses to give evidence that Mark had said, before the boy's body had been discovered, that a young boy had been murdered. The judge ruled that that evidence was hearsay and inadmissible. He also refused an application by the appellant to call Mark and treat him as a hostile witness.

The appellant was convicted on both counts, and his appeal against conviction, on the ground that the judge had been wrong to exclude the evidence in question, was dismissed by the Court of Appeal (Criminal Division).

The certified question for the House of Lords was, *inter alia*, whether evidence of words spoken by a third party who is not called as a witness is hearsay evidence, if it is advanced as evidence of the fact that the words were spoken and so as to indicate the state of knowledge of the person speaking the words: the inference to be drawn from such words is not that the statement is true, but that the person speaking them may be guilty himself of the offence with which the defendant is charged.

HELD

Dismissing the appeal, that the principle that statements made to a witness by a third party were not excluded by the hearsay rule when they were put in evidence solely to prove the state of mind of the maker of the statement or of the person to whom it was made, applied only where the state of mind evidenced by the statement was directly in issue at the trial or of direct and immediate relevance to an issue in the trial.

Mark's knowledge that the boy had been murdered had not been in issue at the trial nor *per se* was it of any relevance to the issue at the trial, which had been whether it was proved that the appellant had buggered and murdered the boy. How Mark had come by that knowledge, albeit relevant, had been a matter of pure speculation as to which the statements of the witnesses in question would have been of no probative value.

K IDENTIFICATION EVIDENCE

PART ONE: Famous False Identifications

46 ADOLF BECK[17]

46.1 The Adolf Beck case was a notorious incident of wrongful conviction by mistaken identity, brought about by unreliable methods of identification, erroneous eyewitness testimony, and a rush to convict the accused.

46.2 As one of the best known causes célèbres of its time, the case led to the creation of the English Court of Criminal Appeal in 1907.

BECK'S BACKGROUND

46.3 Adolf (or Adolph) Beck was born in Norway in 1841, and educated as a chemist. However, he went to sea soon afterwards and moved to England in 1865, working as a clerk to a shipbroker. In 1868 he moved to South America, where he made a living for a while as a singer, then became a shipbroker, and was also engaged in buying and selling houses.

46.4 He returned to England in 1885 and engaged in various financial schemes, including an investment in a copper mine in Norway. Unfortunately, the mine did not turn a profit, and he poured in more and more money until he had to put the mine up for sale. There were no takers and he was reduced to near-poverty. He was also in debt to the hotel in Covent Garden where he lived, had borrowed money from his secretary, and was chronically short of money. Nevertheless, he tried to keep up appearances by dressing in a frock coat and top hat whenever he went out, even though they had become threadbare.

THE FIRST ARREST AND CONVICTION

46.5 On 16 December 1895, Beck was stepping out of the front door of 135 Victoria Street (or 139, according to at least one account) when a woman blocked his way. She accused him of having tricked her out of two watches and several rings. Beck brushed her aside and crossed the road. When the woman followed him, he complained to a policeman that he was being followed by a prostitute who had accosted him. The woman demanded his arrest, accusing him of having swindled her three weeks earlier.

46.6 The policeman took them both to the nearest police station, where the woman identified herself as Ottilie Meissonier, unmarried, and a language teacher. She alleged that she had been walking down Victoria Street one day when Beck approached her, tipping his hat and asking if she was Lady Everton. She said that she was not, but she was impressed by his gentlemanly manner and they struck up a conversation. According to her account, he introduced himself as "Lord Willoughby" and advised her that the flower show she was heading for was not worth visiting. He said that he knew horticulture because he had gardens on his Lincolnshire estate extensive enough to require six gardeners.

Meissonier mentioned that she grew chrysanthemums. The man asked her whether he might see them and she invited him to tea the following day.

46.7 At her home the next day he invited her to go to the French Riviera on his yacht. He insisted upon providing her with an elegant wardrobe for the voyage, wrote out a list of items for her and made out a cheque for £40 to cover her purchases. Then he examined her wristwatch and rings, and asked her to let him have them so that he could match their sizes and replace them with more valuable pieces. After he left, she discovered that a second watch was missing. Suspicious, she hurried to the bank to cash the cheque, only to find that it was worthless. She had been swindled and she swore that it was Adolf Beck who had done it. He was promptly arrested.

46.8 The inspector who was assigned to the case learned that in the previous two years twenty-two women had been defrauded by a grey-haired man who called himself "Lord Wilton de Willoughby" and used

[17] <https://en.wikipedia.org/wiki/Adolf_Beck_case>.

the same *modus operandi* as Beck's accuser had described. These women were asked to view a line-up that included Beck along with ten or fifteen men who had been selected randomly from the street. Because he was the only one with grey hair and a moustache he was quickly identified by the women as the man who had defrauded them.

46.9 Beck was charged with ten misdemeanours and four felonies. The felony charges were based on presumed prior convictions in 1877, when a man named John Smith had been sentenced to five years for swindling unattached women by using the name Lord Willoughby, writing worthless cheques and taking their jewellery. He had disappeared after his release. and it was assumed that Beck and Smith were one and the same. Descriptions of John Smith from prison files were never compared with the current appearance of Adolph Beck.

46.10 At Beck's committal hearing, in late 1895, one of the policemen who had arrested Smith eighteen years before was called to testify. PC Elliss Spurrell gave his account as follows: "In 1877 I was in the Metropolitan Police Reserve. On 7 May 1877 I was present at the Central Criminal Court where the prisoner in the name of John Smith was convicted of feloniously stealing ear-rings and a ring and eleven shillings of Louisa Leonard and was sentenced to five years' penal servitude. I produce the certificate of that conviction. The prisoner is the man. ... There is no doubt whatever – I know quite well what is at stake on my answer and I say without doubt he is the man."

46.11 Beck protested and insisted that he could bring witnesses from South America to prove that he was there in 1877.

46.12 On 5 March 1896 Adolf Beck was found guilty of fraud[and was sentenced to seven years of penal servitude at Portland Convict Prison on the Isle of Portland. In prison he was given John Smith's old prison number, D 523, with the letter W added, indicating a repeat convict.

46.13 England did not yet have a court of criminal appeal, but between 1896 and 1901 Beck's solicitor presented ten petitions for re-examination of his case. His requests to see the prison's description of John Smith were repeatedly denied. However, in May 1898 an official at the Home Office looked at the Smith file and saw that Smith was Jewish and thus had been circumcised, while Beck was not. The Home Office asked Sir Forrest Fulton for his opinion of this new evidence. Fulton wrote a minute dated 13 May in which he acknowledged that Smith and Beck could not be the same person, but he added that even if Beck was not Smith, he was still the imposter of 1895, and that he viewed the South American alibi "with great suspicion." As a result, the letter W was removed from Beck's prison number, but nothing else was done regarding the case.

46.14 While Beck remained in prison, George Robert Sims, a journalist who worked for the Daily Mail and had known Beck since his return to England in 1885, wrote an article in the paper emphasising that Beck had been tried on the assumption that he and Smith were the same person, yet no evidence to support that assumption had been allowed by Judge Fulton. Public opinion was slowly swayed by Sims and others, including Arthur Conan Doyle, to the view that Beck's conviction was unjust.

46.15 Beck was paroled in July 1901 for good behaviour.

THE SECOND ARREST AND CONVICTION

46.16 On 22 March 1904, a servant by the name of Paulina Scott filed a complaint that a grey-haired, distinguished looking man had accosted her on the street, paid compliments to her and then stolen her jewellery. The inspector who took the complaint was familiar with Beck's case and assumed he must be the culprit, so he sent Scott to the restaurant where Beck took his lunch. She did not recognise him but the inspector was undeterred by the woman's uncertainty and set a trap for him.

46.17 On 15 April 1904, as Beck left his flat, Scott ran up to him and accused him of defrauding her of her jewellery. Beck was horrified and denied the charge. Scott repeated her accusations and told him that someone was waiting to arrest him. He ran away in panic, but was caught immediately by the waiting police inspector, who arrested him at once. Beck's panicked flight reinforced the inspector's assumption regarding his guilt.

46.18 He was again put on trial on 27 June at the Old Bailey before Sir William Grantham. Five women identified him and, based on this positive identification, he was found guilty by the jury. The judge, however, was dissatisfied about the case and expressed some doubts regarding it. Despite assurances from the Home Office and the police of Beck's guilt, he decided to postpone sentencing. Ten days later the case was solved once and for all.

THE TRUTH ABOUT JOHN SMITH

46.19 On a routine visit to the Tottenham Court Road police station on 7 July, Inspector John Kane of the Criminal Investigation Department was told of the arrest of a man who had tried to swindle some rings from a pair of unemployed actresses that afternoon and had been apprehended at a pawnshop. The detective was familiar with the Beck case, having been present at Beck's two trials and asked for details. The details fitted the usual pattern but the alleged culprit, Adolph Beck, was already in jail, awaiting sentencing.

46.20 The inspector went to the new prisoner's cell. It held a grey-haired man, approximately of Beck's height, with certain features which made him resemble Beck. However, Beck was younger and frailer in build, and this man had a scar on the right side of his neck, as Ottilie Meissoner remembered. The prisoner had given his name as William Thomas but the inspector, convinced that he was John Smith, informed Scotland Yard. Three of the five women who identified Beck in his second trial were brought in to confront Thomas and they quickly identified him as the swindler (the other two had gone abroad and thus were not present). Other women were brought in as well who also admitted their error in identifying Beck. When the man who had been John Smith's landlord in 1877 identified Thomas as his former tenant, the prisoner confessed his crimes.

46.21 "William Thomas" turned out to be as much an alias as "John Smith" had been, and he had two other aliases as well, "William Wyatt" and "William Weiss". His true identity was Wilhelm Meyer, born in Vienna and graduated from the University of Vienna. He studied leprosy in the Hawaiian Islands under Father Joseph Damien. He later became surgeon to the King of Hawaii and was engaged in growing coffee, and in various other businesses in the United States, even setting up practice as a physician in Adelaide before moving to London. Apparently, he fell upon hard times when he stayed there, and turned to preying on women through fraud. When Beck was sent to prison in his place, Meyer had gone back to the United States and did not come back until 1903, apparently when he thought Beck had served out his sentence, and resumed his swindling until he was finally arrested.

When brought to trial on 15 September, Wilhelm Meyer pleaded guilty to those offences.

AFTERMATH OF THE CASE: THE COURT OF CRIMINAL APPEAL

46.22 Adolf Beck was given a free pardon by the King on 29 July 1904 and in compensation for his false imprisonment was awarded £2,000, later raised to £5,000 due to public clamour (about £300,000 today), again due to George Robert Sims, but those who were responsible were the subject of public indignation.

46.23 Eventually a Committee of Inquiry was established, headed by the noted jurist and Master of the Rolls Sir Richard Henn Collins. It heard evidence from all those involved in the case, including Horace Avory and Sir Forrest Fulton. In its report, it concluded that Adolph Beck should not have been convicted in the first place due to the many errors made by the prosecution in presenting its case. The Committee also chastised Judge Fulton in his conduct on the case, as he should have given consideration to the 1877 case, more so because of his involvement with the 1877 case, which served to prejudice the proceedings against Beck.

46.24 Furthermore, it criticised the Home Office for its indifference in acting on the case despite the fact that it had known since 1898 that Beck and Smith were not the same man. Instead, it sought to preserve the credibility of the judiciary rather than admit or correct its mistakes. It also stated that the omission of the prison authorities to state the fact of Smith's circumcision in the records of 1877 and 1881 was the primary cause of the miscarriage of justice.

46.25 As a direct result of the case, important reforms resulted, including the creation of the Court of Criminal Appeal.

46.26 The case is still cited by judges in Commonwealth countries as a glaring example of how inaccurate eyewitness identification can be, and the extreme care with which juries must regard evidence of this kind. As for Adolf Beck, his exoneration brought him little consolation. He died a broken man of pleurisy and bronchitis in Middlesex Hospital on 7 December 1909.

47 MAHMOOD HUSSEIN MATTAN 1952[18]

47.1 Mahmood Hussein Mattan was a Somali former merchant seaman who was wrongfully convicted of the murder of Lily Volpert on 6 March 1952. The murder took place in the Docklands area of Cardiff, Wales, and Mattan was mainly convicted on the evidence of a single prosecution witness. Mattan was executed in 1952 and his conviction was quashed 45 years later on 24 February 1998, his case being the first to be referred to the Court of Appeal by the newly formed Criminal Cases Review Commission.

MATTAN'S BACKGROUND

47.2 Mahmood Hussein Mattan was born in British Somaliland in 1923 and his job as a merchant seaman took him to Wales where he found work at a foundry in Tiger Bay. In Cardiff he met Laura Williams, a worker at a paper factory. The couple married just three months after meeting, but as a multiracial couple they suffered racist abuse from the community. The couple had three children, but in 1950 they separated and afterwards lived in separate houses in the same street. In 1952 Mattan resigned his job at the steelworks

CONVICTION FOR MURDER

47.3 On 6 March 1952, Lily Volpert, a 42-year-old woman, was found murdered in her outfitter's shop in the Cardiff Docklands area. Her throat had been cut with a razor, and about £100 (equivalent to about £2,700) had been stolen. Within a few hours Mattan was questioned by the Cardiff City Police and ten days later he was charged with Volpert's murder. When the police raided Mattan's home they discovered a broken shaving razor and a pair of shoes with blood specks on them. There was no evidence of any blood-stained clothing or the missing money.

47.4 The trial took place at the Glamorgan Assizes in Swansea in July 1952. The main witness for the prosecution was Harold Cover, a Jamaican with a history of violence, who later received a share of a reward of £200 (equivalent to about £5,500) offered by the Volpert family. Cover claimed to have seen Mattan leaving Volpert's shop, though it later emerged that he had previously identified another Somali living in the area at the time, Taher Gass, as the man he had seen. The jury was not told of this, or of Cover's background during the trial. Neither was the jury informed that four witnesses had failed to select Mattan from an identification parade.

47.5 One 12-year-old girl, who saw a black man near the shop at the time of the murder, and was confronted with Mattan, stated that he was not the person she witnessed, but the police ignored her statement and did not take the evidence to court. Furthermore, the shoes belonging to Mattan with specks of blood were second-hand, and no forensic information was brought forward linking the samples.

47.6 Mattan was described as having a limited understanding of English, and refused the services of an interpreter. In a trial slanted with racial overtones, Mattan's barrister described his client as "Half-child of nature; half, semi-civilised savage". These comments are likely to have prejudiced the jury and undermined Mattan's defence, particularly since they came from Mattan's own barrister, who had the task of defending him.

47.7 On 24 July 1952, Mattan was convicted of the murder of Lily Volpert and the judge passed the mandatory sentence of death.

[18] <https://en.wikipedia.org/wiki/Mahmood_Hussein_Mattan>.

47.8 Mattan was refused leave to appeal and to call further evidence in August 1952, and on 3 September 1952, six months after the murder of Volpert, he was hanged at Cardiff Prison.

POSTHUMOUS APPEAL

47.9 The Mattan family's first attempt to overturn the conviction was denied in 1969 by the Home Secretary James Callaghan; by this stage, three years had passed since the death penalty's abolition.

47.10 In 1996 the family was given permission to have Mattan's body exhumed and moved from a felon's grave at the prison to be buried in consecrated ground in a Cardiff cemetery.

47.11 When the Criminal Cases Review Commission was set up in the mid-1990s, Mattan's case was the first to be referred by it. On 24 February 1998 the Court of Appeal came to the judgment that the original case was, in the words of Rose LJ, "demonstrably flawed".

47.12 The family were awarded £725,000 compensation, to be shared equally among Mattan's wife and three children. The compensation was the first award to a family for a person wrongfully hanged.

48 JEAN CHARLES DE MENEZES 2005

BACKGROUND TO THE CASE

48.1 On 7 July 2005, four suicide bombers detonated bombs on the London transport network, killing themselves and 52 other people. On 21 July 2005, explosive devices were discovered in rucksacks left on three underground trains and on one bus. On 22 July 2005, the police conducted a surveillance operation at an address at which two suspects in the failed bombings of 21 July were thought to live.

48.2 Jean Charles de Menezes, a 27-year-old Brazilian electrician, lived close to that address and was wrongly identified as one of the suspects.

48.3 On July 22, 2005, he was followed to an underground station and shot dead by armed officers while on board a stationary Northern line train at Stockwell. He was shot seven times in the head and once in the shoulder at point-blank range by officers from the Met police's CO19 firearms unit.

WHY DID POLICE THINK HE WAS A TERRORIST?

48.4 In the early hours of that day, police traced a gym card found in one of the bags containing the failed bombs to an address at Scotia Road, south London. They believed it was being used by a suspected terrorist called Hussain Osman.

48.5 A senior officer drew up a plan that anyone coming out of the address should be allowed to walk a short distance away so they were out of sight of anyone else in the flats, then stopped by armed police and their identity checked.

48.6 After he left his flat, for some reason officers allowed him to board a bus towards Stockwell station. They followed him and shot him after he boarded a Northern line train at Stockwell. Rules of engagement introduced by the Met to deal with suicide bombers required armed officers to shoot and kill suspected bombers before they have a chance to detonate any explosives. But it was a case of mistaken identity.

WHAT DID THE POLICE SAY ABOUT THE SHOOTING?

48.7 The Met police commissioner, Sir Ian Blair, told a press conference that the dead man "was challenged and refused to obey police instructions", while Scotland Yard said his "clothing and behaviour at the station added to their suspicions".

These claims were all later found to be false. Blair admitted the force had made a "serious mistake" in the immediate aftermath of the shooting.

48.8 In 2007, the Office of the Commissioner of the Police of the Metropolis was found guilty of breaches of the Health and Safety at Work etc. Act 1974 s.3 and s.33 in connection with M's death. However, no individual police officers were prosecuted.

48.9 In 2009, the Met had to pay compensation believed to be just over £100,000 plus the family's legal costs. In return the family agreed to end their legal (civil) action against Scotland Yard.

THE CASE IN THE ECHR 2016

48.10 ***Da Silva v. United Kingdom*** **(5878/08) (2016) 63 E.H.R.R. 12**

Lawyers for the family argued the decision not to prosecute anyone over the shooting was in violation of De Menezes' right to life, under Article 2 of the European Convention on Human Rights.

They also challenged the definition of self-defence used by British authorities in the case.

In a ruling, judges in Strasbourg concluded there had been a thorough investigation into De Menezes' death, which "concluded that there was insufficient evidence against any individual officer to prosecute".

They found that the Crown Prosecution Service was not obliged to lower the evidence threshold under human rights laws where the state was involved in the killing.

"The decision not to prosecute any individual officer was not due to any failings in the investigation or the state's tolerance of or collusion in unlawful acts; rather, it was due to the fact that, following a thorough investigation, a prosecutor considered all the facts of the case and concluded that there was insufficient evidence against any individual officer to meet the threshold evidential test in respect of any criminal offence.

"Nevertheless, institutional and operational failings were identified and detailed recommendations were made to ensure that the mistakes leading to M's death were not repeated. Those institutional failures resulted in the conviction of the Office of the Commissioner of the Police of the Metropolis for offences under the 1974 Act. This was not a case of "manifest disproportion" between the offence committed and the sanction imposed. The cases in which the instant court had found such a manifest disproportion were ones in which individuals were found guilty of serious offences but given excessively light punishments. Here, an independent prosecutor weighed all the evidence in the balance and decided that there was only sufficient evidence to prosecute the Office of the Commissioner of the Police of the Metropolis for offences under the 1974 Act. Moreover, there was no evidence to indicate that the "punishment" imposed (a fine of £175,000 and costs of £385,000) was excessively light for offences of that nature."

The decision by Europe's highest human rights court brings to an end an 11-year legal saga which saw the police's account of events rejected at an inquest.

NEWS REPORT ON THE DE MENEZES CASE

48.11 THE PROBLEM WITH EYEWITNESSES[19]

The aftermath of the shooting of Jean Charles de Menezes at Stockwell Tube station has shown that eyewitness testimony may not always be as reliable as it seems.

On the day Mr Menezes was killed, a picture was quickly painted by eyewitnesses of a suspect who had vaulted over a ticket barrier, ran away from police, and had worn a bulky jacket that could have concealed a device.

Scotland Yard did nothing to dispel that impression, saying that the shooting had been "directly linked" to anti-terrorism operations, that Mr Menezes had been challenged but had not obeyed, and that the victim's "clothing and behaviour" had added to suspicions.

[19] Finlo Rohrer BBC News <http://news.bbc.co.uk/1/hi/uk/4177082.stm>.

Over the last month, the image of Mr Menezes' conduct has been slowly dispelled, before being completely shattered by Independent Police Complaints Commission documents leaked to ITV News.

Identification errors

According to the documents, Mr Menezes was wearing a light denim shirt or jacket, walked through the barriers having picked up a free newspaper, and only ran when he saw his train arriving. It has left many scratching their heads as to how the witnesses could have got it so wrong.

The reliability of eyewitness accounts of crime has proved a rich seam for psychologists and criminologists to mine over the years. Andrew Roberts, a lecturer in law at Leeds University specialising in evidence, said courts have recognised for a long time that eyewitness identification evidence is "inherently unreliable".

News reports

But it is not just the thorny issue of recognising a face that confuses witnesses. Witnesses' recollection of every aspect of an incident can be contaminated by what they hear from other people.

Forensic psychologist Dr Fiona Gabbert has been working at Aberdeen University with Professor Amina Memon on the distortions in eyewitness recollection.

"Memories are very vulnerable to error. If you witness a crime and then read a local news report everything can be combined in your memory at a later date," she said.

"It can be hard to distinguish between what you saw, and another source of information. If there are two people witnessing a crime it is very likely that you are going to ask the person next to you or say 'I can't believe what just happened'."

In studies at the university, subjects were shown very slightly different versions of the same event, such as a crime filmed from different angles.

The subjects are allowed to talk and then a statement is taken as if they are talking to the police.

Dr Gabbert said 70% of participants reported witnessing at least one thing they could not possibly have seen themselves.

Easily influenced

Even when given a "source monitoring test", where the participants are asked to highlight what they saw and what might have come from other sources, 50% will report an item from their discussions with other people as their own.

"It is a true memory error - you are really thinking that you have seen it. It is horrifically scary," Dr Gabbert continued.

"There are criminal cases where witnesses identified the same innocent person. It goes to show your memory is so easily influenced. You discuss your memories with people every single day."

Not just other witnesses, but leading questions from journalists or investigators can also have an influence.

Detectives are always keen to speak to witnesses before reporters are able to get to them, fearing that sensational aspects will filter into their recollections.

And even without the influence of other people, retaining an accurate recollection of a complex event is not easy.

Mr Roberts said stress was a major factor in distorted testimony.

"When you see a very violent episode you are likely to be under great stress that adversely affects your ability to recall events accurately. There is also a well-known effect called 'weapon focus'. If you are watching an event where someone is brandishing a gun you don't recall as much information - psychologists think naturally your focus is on the weapon."

In a rolling news society, the effect of the media is powerful.

"One of the most dangerous things about the [Stockwell] shooting is the amount of information that is in the public domain. Witnesses on the tube are likely to have seen other witness accounts, the official version and information that followed from the police," Mr Roberts said.

"Where a witness is exposed to post-event information that tends to get assimilated into the memory."

Mr Roberts cited a study of Amsterdam residents who lived near the site of a 1992 plane crash that claimed 43 lives after a cargo jet smashed into an apartment block.

"The crash was never filmed. But quite a large proportion were adamant they had seen footage on TV and could recall images that were very graphic. They had got all this information from various sources but remembered it as an image they had seen on TV."

And setting aside all these factors, eyewitnesses can get things wrong because of interpretation.

Photo shop manager Christopher Wells, who said he saw the Stockwell victim vaulting a ticket barrier, has since conceded that he must have seen a plain clothes police officer.

PART TWO: The Devlin Committee

49 THE DEVLIN COMMITTEE REPORT 1976

49.1 A departmental committee was set up in the mid-1970s under the chairmanship of Lord Devlin to report on evidence and identification procedures.

49.2 The main momentum for the committee proceedings were two recent miscarriages of justice in which false identification evidence had led to convictions which were later overturned.

***R v. Laslo Viraq* (1969)**

49.3 In 1969, Laszlo Virag was convicted of stealing from parking meters and using a firearm while trying to escape police officers. Despite his strong alibi and other contradictions in the evidence, he was identified by eight witnesses as the man who committed the crime.

While he was in prison it was found another person had committed the crime and he was pardoned.

49.4 ***R. v. Luke Dougherty* (1972)**

In 1972, Luke Dougherty was convicted of shoplifting after two witnesses picked his face out of a police album.

He was eventually cleared, with the Court of Appeal and the Devlin Committee noting numerous flaws in both the investigation and the trial.

49.5 Professor Glanville Williams commented:

‘Neither the Beck case at the turn of the century nor the many miscarriages of justice since then have sufficiently impressed those concerned with criminal justice of the dangers of identification evidence. To mention some of the instances in late years: three occurred alone in the space of a few months in 1967-68. A memorandum of the National Council of Civil Liberties published in 1968 gave details of 15 cases from 1966 onwards. In most of these a person was convicted on identification evidence and

the mistake was either established or very likely: in a few of them the defendant had not gone beyond being committed for trial when by a happy accident the mistake was discovered.'

49.6 The committee reported in 1976, reaching this conclusion:

'We are satisfied that in cases which depend wholly or mainly on eye-witness evidence of identification, there is a special risk of wrong conviction. It arises because the value of such evidence is exceptionally difficult to assess: the witness who has sincerely convinced himself and whose sincerity carries conviction is not infrequently mistaken. We have found no forensically practical way of detecting this sort of mistake.'[20]

PART THREE: The Turnbull Direction

50 INTRODUCTION

50.1 At the same time as the Devlin Committee was reporting, a supercharged Court of Appeal considered the problems of identification evidence and issued a set of guidelines designed to reduce the risk of miscarriages of justice.

50.2 The guidelines fall into two sections:

1. Whenever a case against a defendant depends wholly or substantially on the correctness of one or more identifications of the defendant, which the defence alleges to be mistaken, the direction to the jury should include a warning of the special need for caution before convicting the defendant and the reasons for that caution.

2. Further, the quality of the identification should be considered and the jury should be directed to examine closely the circumstances in which the identification was made. Where the quality of the identification is good, the jury can safely be left to assess the value of the evidence, but, where the quality is poor, the case should be withdrawn from the jury unless there is other evidence capable of supporting the identification. The judge should direct the jury on the evidence that is capable of supporting the identification.

51 THE TURNBULL CASE

51.1 ***R. v. Turnbull*** **[1977] Q.B. 224**

On October 13, 1975, the defendants, Raymond Turnbull and Joseph Nicholas David Camelo, were convicted at the Newcastle-upon-Tyne Crown Court of conspiracy to commit burglary and were each sentenced by Judge Smith to three years' imprisonment.

They appealed against conviction on the ground that the verdict of the jury was unsafe and unsatisfactory, being based upon the identification of Turnbull by a single detective constable who knew him previously, who was in a moving car looking across a road at night and who caught a glimpse of him as he momentarily turned his head.

51.2 **FACTS OF THE CASE**

Three cases were heard together. The facts of the Turnbull case itself were as follows.

Raymond Turnbull and Joseph Camelo had devised a scheme whereby they could induce shopkeepers, customers of the Gosforth Branch of Lloyds Bank Ltd., to post their night safe wallets containing their day's takings through the ordinary letter-box in the main front door of the bank instead of into the night safe. Turnbull and Camelo then intended that in the course of the following night or week-end they would break into the bank through a window at the rear of the branch which was unprotected by any burglar alarm, and remove the wallets which would be conveniently lying on the floor just within the bank's front door.

[20] Devlin, Report to the Secretary of State for the Home Department on Evidence and Identification in Criminal Cases, 1976, London HC 338;
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228523/0338.pdf>.

The first step in the conspiracy was to put the night safe out of action by inserting a bent nail into its lock. A notice typed on bank notepaper and purporting to be signed by a non-existent area manager was then fixed above the night safe. This notice informed customers that owing to vandalism the night safe was out of order and advised them to put their deposits through the bank letter-box. Over the latter a card was fixed upon which was boldly printed the message "Night Safe here."

Between about 5.30 p.m. and 6.30 p.m. on December 21, 1974, a number of unsuspecting shopkeepers and the employees of one security firm, following the instructions on the two notices, posted wallets containing over £5,000 takings through the bank's letter-box.

51.3 THE TRIAL

At the trial, the principal witness on identity was Detective Constable Smith. He gave evidence that on the relevant night he had signed off duty at Gosforth Police Station, which was not far from the bank, at 8 p.m. He went to the car park at the rear of the police station and drove into the main road to which reference has been made and along it towards the bank. As he did so, and at a point which it was agreed was some 62 yards from the front door of the bank, Smith said that he saw a man in that doorway who seemed to be taking a notice from the door of the bank. The man left the doorway and started to walk to his left along the pavement with his shoulders hunched to the point in the wall of the bank where the night safe was. There he pulled another notice quickly off it and as he did so he glanced briefly to his right, that is to say along the main road in the direction from which Detective Constable Smith had been coming.

At the time, Smith's car was just passing the bank, some 10 yards or so from the night safe and Detective Constable Smith's evidence was that as the man turned his head, he (Smith) recognised him and recognised him as the appellant Turnbull. The latter was a man whom the officer had known for some time. Detective Constable Smith said that it was a well-lit street and that he had no difficulty in recognising Turnbull.

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Counsel for the Crown accepted that the quality of the identification by Detective Constable Smith could not be said to have been good, and indicated that had there been no other supporting evidence he would not have been disposed to argue that the appellants' convictions should stand. In the circumstances, however, he contended that there was ample other evidence which went to support the correctness of Smith's identification.

He pointed out that Smith already knew Turnbull and that his was more recognition than mere identification. Both Smith and another witness gave a general description of the man they each saw and of the coat which he was wearing that night which was consistent with the facts. A van recently hired by Camelo was in the vicinity at the relevant time and Sergeant Wakenshaw had recognised Camelo at the wheel as the van passed the bank.

A few minutes later, when the van was stopped a mile or so away, both Camelo and Turnbull were in it and there was substantial evidence that at about that time the latter at least had been in possession of housebreaking implements.

The Court of Appeal held that there was clearly evidence which went to support the correctness of Smith's identification of Turnbull, and thus the implication that both he and Camelo had conspired as charged. Given the honesty of Smith's identification which, as we have said, the jury must have accepted, our opinion is that there can be no real doubt about its accuracy.

In the result the court not think that it can be said that the verdicts in this case were in any way unsafe or unsatisfactory and the appeals against conviction were therefore dismissed.

51.4 THE TURNBULL GUIDELINES

In the course of the judgment, Lord Widgery CJ set out the correct procedures for cases which rested on identification evidence.

In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment.

First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the

correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them.

Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case. the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger.

In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur. A few examples, taken over the whole spectrum of criminal activity, will illustrate what the effects upon the maintenance of law and order would be if any law were enacted that no person could be convicted on evidence of visual identification alone.

Here are the examples. A had been kidnapped and held to ransom over many days. His captor stayed with him all the time. At last he was released but he did not know the identity of his kidnapper nor where he had been kept. Months later the police arrested X for robbery and as a result of what they had been told by an informer they suspected him of the kidnapping. They had no other evidence. They arranged for A to attend an identity parade. He picked out X without hesitation. At X's trial, is the trial judge to rule at the end of the prosecution's case that X must be acquitted?

This is another example. Over a period of a week two police officers, B and C, kept observation in turn on a house which was suspected of being a distribution centre for drugs. A suspected supplier, Y, visited it from time to time. On the last day of the observation B saw Y enter the house. He at once signalled to other waiting police officers, who had a search warrant to enter. They did so; but by the time they got in, had escaped by a back window. Six months later C saw Y in the street and arrested him. Y at once alleged that C had mistaken him for someone else. At an identity parade he was picked out by B. Would it really be right and in the interests of justice for a judge to direct Y's acquittal at the end of the prosecution's case?

A rule such as the one under consideration would gravely impede the police in their work and would make the conviction of street offenders such as pickpockets, car thieves and the disorderly very difficult. But it would not only be the police who might be aggrieved by such a rule. Take the case of a factory worker, D, who during the course of his work went to the locker room to get something from his jacket which he had forgotten. As he went in, he saw a workmate, Z, whom he had known for years and who worked nearby him in the same shop, standing by D's open locker with his hand inside. He hailed the thief by name. Z turned round and faced D; he dropped D's wallet on the floor and ran out of the locker room by another door. D reported what he had seen to his chargehand. When the chargehand went to find Z, he saw him walking towards his machine. Z alleged that D had been

mistaken. A directed acquittal might well be greatly resented not only by D but by many others in the same shop.

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification: for example, X sees the accused snatch a woman's handbag; he gets only a fleeting glance of the thief's face as he runs off but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's.

Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in Reg. v. Long (1973) 57 Cr.App.R. 871 . The accused, who was charged with robbery, had been identified by three witnesses in different places on different occasions but each had only a momentary opportunity for observation. Immediately after the robbery the accused had left his home and could not be found by the police. When later he was seen by them, he claimed to know who had done the robbery and offered to help to find the robbers. At his trial he put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment odd coincidences can, if unexplained, be supporting evidence.

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused himself.

Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was.

In setting out these guidelines for trial judges, which involve only changes of practice, not law, we have tried to follow the recommendations set out in the Report which Lord Devlin's Committee made to the Secretary of State for the Home Department in April 1976. We have not followed that report in using the phrase "exceptional circumstances" to describe situations in which the risk of mistaken identification is reduced. In our judgment the use of such a phrase is likely to result in the build-up of case law as to what circumstances can properly be described as exceptional and what cannot. Case law of this kind is likely to be a fetter on the administration of justice when so much depends upon the quality of the evidence in each case. Quality is what matters in the end. In many cases the exceptional circumstances to which the report refers will provide evidence of good quality, but they may not: the converse is also true.

A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe.

52 THE CONTENT OF A TURNBULL DIRECTION

52.1 There is no expectation that the trial judge incants a special or specific formula.

52.2 The key elements of a Turnbull direction are as follows:

i. Whenever a case depends wholly or substantially on disputed identification evidence, the judge has to warn the jury of the special need for caution before convicting in reliance on that evidence.

ii. The judge must explain why special caution is needed when considering identification evidence and, more particularly, must tell the jury that a convincing identifying witness can still be a mistaken one, which might lead to a miscarriage of justice[21]. There is no necessary correlation between confidence and accuracy.

iii. The judge has to direct the jury to examine the circumstances of the identification closely, including such matters as the length of time the accused was under observation, his distance from the witness, the lighting, the clarity of view, whether the witness had ever seen him before, and the time elapsed between the observation and the subsequent identification to the police.

iv. The judge has to indicate any specific weaknesses in the identification evidence, and remind the jury that mistakes in the recognition of close friends and relatives could sometimes be made.

v. Where the quality of the identification evidence is good, the jury can safely be left to assess its value even if there is no other evidence to support it, provided that an adequate warning has been given about the special need for caution. However, when the quality of the identifying evidence is poor, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence supportive of the correctness of the identification

vi. Such supporting evidence need not amount to corroboration in its technical sense, and the judge should identify for the jury any evidence that s/he adjudges to be capable of supporting the identification.

vii. The judge has, however, to take special care when dealing with a false alibi. A false alibi could only be supportive of disputed identification evidence if the jury was satisfied that the sole reason for the fabrication was to deceive them, and they are to be reminded that the fact that an accused has lied about his whereabouts does not of itself prove that he has been where the identifying witness said he has.

53 IDENTIFICATION THROUGH RECOGNITION *WHEN THE WITNESS ALREADY KNOWS THE ACCUSED*

53.1 Although the Turnbull direction is especially important where the witness is claiming to identify a stranger whom he has never seen before the incident, it might also be needed were they are already acquainted. How often does someone say: “I saw someone today. I could have sworn it was you!”

53.2 ***R. v. Turnbull*** **[1977] QB 224**

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.” per Lord Widgery at p.228

[21] *R v. Nash* [2004] EWCA Crim 2696.

53.3 ***R. v. Thomas Bentley*** **(1994) 99 Cr. App. R. 342**

THE ALLEGED FACTS

On February 26 1989, there was a function in the British Legion Club at Parsons Green, that occasion being the televised version of the boxing match between Bruno and Tyson. A large number of people attended the show.

After the televised fight had finished, a young man in the club called Kieran Lismore was severely wounded by a glass that was pushed into his face by someone or other.

The prosecution case was that it was Thomas Bentley who had inflicted those injuries on Lismore. The only evidence that it was Bentley was that given by Lismore himself.

There was no doubt that the two young men, Lismore and Bentley, had known each other for some considerable time. Indeed, they went to the same primary school. The two of them were not particularly friendly but they had met each other from time to time over the years, and indeed had played some sort of sport together.

Kieran Lismore had gone to watch the boxing match at the British Legion Club, although he was not a member. There is no doubt at all that he had had a great deal too much to drink: seven or eight pints of lager. When he reached the hospital to have his injuries attended to, it was noted by the doctor who treated him that he was well under the influence of alcohol at that time.

According to Lismore, as he went up to the bar to get a drink he collided with Bentley and what he described as an unfriendly exchange of words took place between them, although he could not remember precisely what it was that was said. According to him at that point, or shortly afterwards, Bentley lunged at him and he heard a crunching noise round his face.

THE DEFENCE

Bentley denied that he had been the assailant. Indeed, he denied that he had been present at that time. He said that he had left before this particular fracas took place.

THE JUDGE'S SUMMING UP

"The issue there—and it has been made quite plain to us throughout the trial—is that Thomas Bentley says, 'It wasn't me'. That is his defence reduced to three words, 'It wasn't me'. You will be looking at the evidence to decide whether or not the prosecution has made you sure that it was him who caused those injuries…

"Let me make it quite plain that the only evidence that identifies this defendant, Thomas Bentley, as being the assailant of Kieran Lismore is that of Kieran Lismore. There is no other evidence that pins Thomas Bentley down as being the assailant, and so you will have to look very carefully at Kieran Lismore's evidence to see whether that evidence satisfies you so that you are sure that it was Thomas Bentley who wounded him…

"That is really the nub of what you have to determine so far as his evidence is concerned, and you are looking at his evidence against the background that he had certainly had a very great deal to drink that night, or that night and the following morning, some seven or eight pints of lager. He was clearly under the influence of alcohol when he got to the hospital because the doctor, who was the first witness called before you noticed that fact and made a note of it in his hospital records."

THE VERDICT

On February 8, 1990, Bentley was convicted by a majority of 10 to two of wounding with intent to do grievous bodily harm, contrary to section 18 of the Offences against the Person Act 1861 . On February 9 he was sentenced to two years' detention in a young offender institution.

THE APPEAL

Bentley appealed on the grounds that the judge did not give a sufficient direction on the lines of *Turnbull (1976) 63 Cr.App.R. 132, [1977] Q.B. 223* , before the jury retired.

It was held, allowing the appeal, that the failure to warn of the danger of incorrect identification evidence being given by an apparently honest witness, and the further danger of an honest, convincing witness nevertheless making a mistaken identification, amounted to a material misdirection. Accordingly, the conviction was quashed.

LORD LANE CJ

"So far as it went, this was a model summing up in clarity and conciseness. But there is no doubt that there were two matters missing from it.

"The first was that there was no warning as to the dangers of identification evidence and the reason for those dangers existing, namely the experience the courts have had of mistakes in the past, and there was no warning to the jury that a convincing witness may nevertheless be a wrong witness. The problem we have to decide is whether in the circumstances of this particular case—I stress that in the circumstances of this particular case—those directions rendered the conviction unsafe or unsatisfactory and amounted to a material misdirection…

"The second thing which the jury are unlikely to know is the substantial degree of risk that honest witnesses may be wrong in their evidence of identification…

"The only question which remains therefore in the absence of such directions in the present case is whether this was a case where such directions were required? We have come to the conclusion, not without some considerable hesitation, that it was such a case, that the judge should have given those two sorts of warning to the jury and that the absence of them was a material misdirection. It follows therefore that we are not satisfied that this was a safe or satisfactory conviction. It follows likewise that this appeal must be allowed and the conviction quashed."

"What is sometimes called the recognition type of identification—as it was in this case—can be treated as straightforward or trouble free. It cannot. Each of us, and no doubt everyone sitting in this Court, has had the experience of seeing someone in the street whom we know, only to discover later that it was not that person at all. The expression "I could have sworn it was you" indicates the sort of warning which the judge should give, because that is exactly what the witness does. He swears that it was the person he thinks it was. He may nevertheless have been mistaken even where it is a case of recognition rather than one of identification.

"There are even in the narrow field of recognition cases degrees of danger. There is perhaps less danger where, as in the present case for example, two people, the identifier and the so called identified, know each other and have known each other for many years; perhaps less danger where there is no doubt that the identified person was in fact at the scene at the time and was not somewhere else altogether. Even here it is at least advisable that the jury should be alerted to the possibility of the honest mistake and to the dangers of identification evidence, and the reason for those dangers."

per Lord Lane CJ

53.4 ***Mark Anthony Capron v. The Queen*** **[2006] UKPC 34 Privy Council, the Bahamas**

The appellant, Mark Capron, appealed against a decision of the Court of Appeal of the Bahamas dismissing his appeal against his conviction for the murder of Andrew Ferguson, for which Capron had been sentenced to death.

According to the Crown's principal witnesses, Gregory Ferguson and Irvin Brown, they saw Capron shoot the victim. The incident occurred in broad daylight on the morning of 6 March 2001 in Johnson Alley in Nassau. There was an argument between Jermaine Hepburn (also known as "Bingy") and Irvin Brown. Bingy had a knife. A scuffle broke out between Bingy and Brown. The deceased was present.

Gregory Ferguson said that Capron came across the street with a gun, took hold of the deceased by the neck and shot him. He then ran after Irvin and shot at him. Capron then came back and fired another shot at the deceased who was lying on the ground.

Gregory Ferguson identified Capron in the dock. He said that he had grown up with Capron and had known him for 8 to 9 years or more. During that period, he would see Capron sometimes twice a day, almost every day.

Capron's defence had been that the witnesses were lying when they identified him as the murderer, and that the witnesses themselves had attacked the victim in connection with a drugs matter. Capron had also maintained that at the time of the murder he had been talking to his uncle on the porch of the uncle's house, and he had relied on an alibi placing him there before and after the shooting.

On the basis that it was not a case of mistaken identity, but whether the witnesses were lying, the trial judge summed up without a Turnbull warning, but directed the jury that it had to be sure that the witnesses were telling the truth and that they were not mistaken about the identity of the person who had shot the victim.

The judge also stated that the witness providing the alibi could not say for sure that he had seen Capron on the porch at the time of the shooting, and said that the jury might think his evidence did not assist Capron.

Capron appealed *inter alia* on the basis that even though the defence had attacked the witnesses on the basis that they were lying, rather than that they were mistaken in their identification of Capron, the judge should have given a *Turnbull* direction.

The Privy Council held that even in a recognition case, the trial judge should give an appropriate *Turnbull* direction unless, despite any defence challenges, the nature of the eye witness evidence was such that the direction would add nothing of substance to the judge's other directions to the jury on how they should approach that evidence

In this case, the jury had the evidence of the witnesses who had known Capron for many years before the incident and who would have been able to recognise him in the conditions prevailing, and a full *Turnbull* direction would not have added anything of substance to the directions that the judge actually gave the jury. The absence of a *Turnbull* direction did not, therefore, make Capron's conviction unsafe.

However, the judge's comments that the alibi witness had only seen Capron on the porch before and after the incident rather than at the very time of the shooting, and that his evidence did not take Capron's case any further, was too extreme and should not have been made in those terms. While it was true that the alibi witness could not say who had fired the shots, the absence of that particular evidence did not detract in any way from the actual evidence that he was able to give, namely that Capron had been on his uncle's porch both before and after the incident. Capron was fully entitled to make that point and it was essential that the jury should have been left to consider it, free from the judge's repeatedly expressed and extremely negative assessment of the evidence.

Given that the Crown's case depended on the jury accepting the evidence of W, and that the alibi evidence could be seen as casting doubt on their evidence, it was impossible to say that, if the jury had been given appropriate directions on the alibi evidence, they would inevitably have returned the same verdict. Accordingly, the verdict was unsafe.

"Even in a recognition case, the trial judge should always give an appropriate Turnbull direction unless, *despite any defence challenges, the nature of the eye witness evidence is such that the direction would add nothing of substance to the judge's other directions to the jury on how they should approach that evidence."* per Lord Rodger at para 16

53.5 The fact that the witness has some prior acquaintance with the suspect also does not automatically dispense with the need for an Identification Parade.

53.6 ***R v Fergus*** **[1992] Crim LR 363**

Fergus was charged with wounding with intent and affray. The prosecution case was that the victim, R, came with others to a party attended by F and was stabbed by F during a general disturbance when R and the two other men in his group were stabbed by F's two brothers (who were also charged).

The issue was the identity of R's first assailant. R said that he did not really know F beforehand but had seen him and his brothers once before when someone had told him who F was. The Crown sought

leave to ask R if the man he knew as F was in court. The judge agreed and F and his two brothers changed places in the dock. R then identified F as the man he knew by that name.

A further witness named F as the attacker but likewise said that he did not know F, though he had seen him.

F was convicted and appealed, submitting, *inter alia*, that the judge should not have admitted the evidence of R purporting to identify F without an identification parade.

Held, allowing the appeal, there was an important distinction to be made between cases where the complainant claimed to recognise the assailant as a person he already knew well and those where the complainant had never seen the assailant before.

Although danger of mistake existed in the "recognition" case it was less than in the identification case.

The case where the complainant had seen the assailant only once or on a few occasions before might well be treated as that of identification rather than recognition. It was acknowledged that dock identification was unsatisfactory but the identification of a person through a name which was only known by hearsay was almost equivalent to a dock identification.

In a case of recognition an identification parade would often be pointless but in the present case an identification parade or at the least a controlled confrontation should have been held. Since the only previous time when R had seen F was a casual incident when there was little occasion to remember him and bearing in mind the difficult lighting and other circumstances when the attack occurred the conviction was unsafe or unsatisfactory.

54 CASES THAT MUST BE WITHDRAWN FROM THE JURY

54.1 In some circumstances, it is considered simply too dangerous for the court to admit visual identification evidence at all. If the prosecution case relies on identification evidence of poor quality and there is no other evidence in the case to support the correctness of the identification, it is the judge's duty to withdraw the case from the jury and to direct an acquittal.

Obvious Cases

54.2 In some cases the need to withdraw the case from the jury is obvious.

***Wilbert Daley v. The Queen* [1994] 1 AC 117 PC Jamaica**

The defendant was charged with the murder of a woman who had been shot by one of two men who had broken into her house. The prosecution case depended wholly on visual evidence of identification by the deceased's husband, which the defence alleged to have been mistaken.

At the close of the prosecution case the judge rejected a submission of no case to answer. The judge in her summing up referred to serious weaknesses in the identification evidence. She warned the jury that the identification had not been very good and expressed her opinion that the prosecution had not made the identification clear enough.

The defendant was convicted and the Court of Appeal of Jamaica dismissed his application for leave to appeal against conviction.

On the defendant's appeal to the Judicial Committee, it was held, allowing the appeal, that where the trial judge considered that the quality of the identification evidence was poor and insufficient to found a conviction, and there was no other evidence to support that identification evidence, he should withdraw the case from the jury at the end of the prosecution case.

However, where the strength of the prosecution evidence depended on the determination of a witness's reliability, and on one possible view of the facts there was evidence upon which a jury could properly convict, the judge should not stop the trial even if he regarded the prosecution evidence as uncreditworthy, but should leave the case to the jury.

In this case, since the trial judge had rationally considered the prosecution's case on identification to be too weak to sustain a conviction, she should have withdrawn the case from the jury with a direction to acquit the defendant; and therefore, a miscarriage of justice had occurred and the conviction would be quashed

Less Obvious Cases

54.3 Sometimes it is not clear that the identification is so poor that the whole case should collapse. In that case, the matter may be left to the jury – with a suitable *Turnbull* warning.

54.4 ***R. v. Dossett (Steven Edward)*** **[2013] EWCA Crim 710**

Steven Dossett appealed against a conviction for robbery.

Dossett and his co-accused (James Ganney), in an unprovoked robbery, knocked the complainants (Dee Riley and Michael Ryan) to the ground at night, punching and kicking them before running off with Riley's handbag. Ryan stated that Dossett was visible in the street lighting. It was accepted that the street lighting was poor and that Ryan's observation took place under difficult conditions.

At an identification procedure, Dossett was picked out by Ryan but not Riley (who picked out a volunteer). A DNA profile matching Ganney was found on the recovered handbag.

Dossett's submission that the identification evidence was too weak to support a safe conviction was rejected. The judge had noted that neither witness mentioned the suspects' tattoos, Riley's failure to identify Dossett, the possibility of distraction during the attack and the discrepancy between Dossett's height estimated by Ryan and his actual height.
Dossett submitted that the judge should have withdrawn the case from the jury because of the weakness of the identification evidence.

Held: Appeal dismissed.

"Although the whole incident lasted only a few minutes, this was not really a case of a fleeting glimpse, such as one might have of a person running away from the scene of a crime. Mr. Ryan and the two robbers were all in close proximity and he was able to get a good look, albeit for only a short period of time, at the face of the man standing behind Miss Riley. Experience suggests that it is not necessary to look at a person's face for long in order to take in its essential features, especially when there is good reason for it to be imprinted on the mind of the observer, as was the case here. It is quite true that neither witness mentions seeing any tattoos, though whether they were clearly visible under the prevailing conditions is uncertain. There is also the discrepancy between Mr. Ryan's assessment of the attacker's height and the height of the appellant, but there is a real distinction between the instinctive process of taking in a person's facial features and the conscious mental process involved in assessing a person's height in feet and inches.

"In our view this was a case in which the quality of the original observation was good enough to justify the judge's leaving the case to the jury provided that she warned them clearly of the dangers inherent in visual identification and drew their attention to the specific weaknesses in the evidence. In the event, no criticism is made of that part of her summing up." per Moore-Bick LJ

Multiple Witnesses

54.5 Even when there is more than one witness, the evidence may still be considered to be too poor for the case to continue.

54.6 ***R. v. Weeder (Thomas Henry)*** **(1980) 71 Cr App R 228**

THE FACTS

Shortly after 10.45 p.m. on April 20, 1978, Mr. Tierney was attacked near his home when returning from a public house. He was struck on the back of the head from behind and fell to the ground underneath a lamp post, where he became unconscious for a short time. When he turned round to see what was happening, he received another blow to his head. He was then hit about the legs and body and tried to protect himself by kicking out. He had a good look at his assailant, who was wielding a bat. The street lamp provided a bright light and Mr. Tierney was looking up at his assailant while he

was being attacked. Another man kicked him in the side but he only saw this man's back. Something was said during the attack about a girl. Both men ran off when Mr. Tierney's neighbours came out to see what was happening.

Miss Susan Massam, aged 18 years, was in her bedroom when the attack took place. She heard a thud on the side of the fence just outside her room. She looked out and saw the appellant hitting a man's legs with a stick-like object. She also saw another man, whom she identified as Patrick O'Toole, beating the man's legs with a tennis racket. The light was shining down right on them. She could see their faces. She knew the appellant because her friend used to go out with him. She had seen him about 50 times. She used to live not far away from where the appellant lived.

The police were called and when they visited the appellant's home shortly afterwards, he was not in. However, at 2 a.m. on the following day the appellant telephoned the police station and asked why the police were looking for him and Patrick O'Toole. The officer said he was not prepared to discuss the matter over the telephone and asked him to come to the police station.

The appellant told the officer that he was after the wrong O'Toole and said: “It's Anthony you want, he and I have been together all night.” He and Anthony O'Toole arrived at the police station about an hour later and when interviewed denied the offence.

THE TRIAL

The trial judge gave a clear Turnbull direction, but did not direct that the trial should end. Weeder appealed on the basis that the judge should have ended the trial because the identification evidence was too poor.

THE APPEAL

It was held by the Court of Appeal that even though multiple witnesses might present ‘poor’ evidence, which should end a trial, this was not such a case. The appeal was dismissed.

“(1) When the quality of the identifying evidence is poor the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. The identification evidence can be poor, even though it is given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions, e.g. the occupants of a bus who observed the incident at night as they drove past.

“(2) Where the quality of the identification evidence is such that the jury can be safely left to assess its value, even though there is no other evidence to support it, then the trial Judge is fully entitled, if so minded, to direct the jury that an identification by one witness can constitute support for the identification by another, provided that he warns them in clear terms that even a number of honest witnesses can all be mistaken.” per the Lord Chief Justice

55 WHEN A TURNBULL DIRECTION MAY BE NEEDED

55.1 In cases in which the judge does not stay the prosecution on account of the Crown’s heavy reliance upon inherently weak identification evidence, a *Turnbull* direction must be delivered whenever the prosecution case depends wholly or substantially on the correctness of one or more identifications of the accused which the defendant alleges to be mistaken.

55.2 ***R. v. Servis*** **[2015] EWCA Crim 2291**

Sergeant Prior, a police officer driving a police patrol car, saw a Ford Focus motor vehicle driving in the opposite direction and thought he recognised the driver as the defendant, Shankye Servis, whom he had encountered a number of times in the course of his police duties. He started to follow the vehicle and found it was being driven dangerously and at excessive speed, so he reported the incident on his police radio, saying he thought he knew who the driver was, but not naming the defendant, and gave the last three letters of the vehicle’s registration number.

Sergeant Prior was then involved in a collision with another vehicle, and had to abandon the chase. The Ford Focus itself collided with a stationary motor vehicle, causing injuries to the two men inside and damage to their vehicle as well as to the Ford Focus. The driver of the Ford Focus got out and left the scene.

The following morning the defendant's mother, Georgia Servis, who was the owner of the Ford Focus, reported her car stolen and the spare key to it missing. The defendant and another son, Malouki, lived with her. The defendant was arrested and interviewed at the police station, where he denied any involvement in the offences, saying he had been with family and friends, but failing to provide their contact details. He was charged with dangerous driving, contrary to s.2 of the Road Traffic Act 1988 , and aggravated vehicle taking, contrary to s.12A of the Theft Act 1968 .

At the trial, the main prosecution witness, who was the officer who had initially given chase, gave evidence identifying the defendant as the driver of the Ford Focus. The defendant's mother, another prosecution witness, said her sons looked alike and had been mistaken for each other before and that there was another man of a similar description living in the house.

The defendant denied any involvement in the offences and said he had been visiting his sister, who gave evidence in support of the defendant's alibi.

Summing up, the judge failed to enumerate the weaknesses in the identification evidence or to put squarely to the jury that the defendant had a brother who looked like him, lived in the same house and had access to the spare key. Further, the judge adopted the prosecution case that the first officer had positively identified the driver of the Ford Focus as the defendant while omitting to mention his name in his radio messages.

The defendant's appeal against conviction was allowed. The judge's summing up was highly criticised.

Appeal allowed.

- The judge's summing up was discursive and badly structured and moved between directions of law and summaries of the factual evidence in a random manner must have been confusing for the jury;
- Nowhere did the judge properly warn the jury about the dangers of mistaken identification, even in a recognition case, nor did he explain why such a warning was necessary;
- Where there were weaknesses in the identification evidence, the judge needed to set them out clearly in one section of the summing up, preferably when he was giving his directions of law:
- There was a possible weakness in the prosecution case that the police officer might have mistaken the defendant for his brother, but that point was not set out in the summing up;
- The chatty comments interjected in the directions of law about identification evidence would have confused the jury and were unhelpful;
- In relation to the alibi evidence, the judge ought to have explained that, if the jury rejected it, it did not mean that the defendant was in fact guilty of the offence charged.
- Accordingly, looking at the summing up as a whole, the directions on the identification issue were unsatisfactory and the conviction was unsafe.

RECOGNITION CASES

55.3 As discussed above, the direction is usually needed even if the defendant and the witness already knew each other.

THE ACCUSED ADMITS HIS PRESENCE AT THE SCENE BUT DENIES HIS PARTICIPATION

55.4 ***R. v. Brian Thornton*** **[1995] 1 Cr App R 578**

Thornton was charged with causing grievous bodily harm with intent. He had been a guest at a wedding reception where the bridegroom's brother was attacked by several people and seriously injured. He was identified by two witnesses as one of those involved in the attack.

Thornton's case was that he had witnessed part of the attack but was not himself a participant. He was convicted and appealed *inter alia* on the grounds that the judge should have given the jury a full *Turnbull* direction.

Held, allowing the appeal, that although Thornton agreed that he had been present during part of the attack he denied taking part in it and in the circumstances a mistaken identification was clearly possible; accordingly, the judge ought to have given the jury a full *Turnbull* direction.

56 WHEN A TURNBULL DIRECTION MAY NOT BE NEEDED

WHEN THE ACCUSED CLAIMS THE WITNESS IS TRYING TO FRAME HIM

56.1 ***R. v. Jason Cape, Stephen Jackson and David Gardner*** **[1996] 1 Cr App R 191**

It was alleged that the appellants were amongst five or six men involved in a fight which broke out in a public house. The victim, Alan Hedley, was held down and beaten and then had his ear bitten off. The appellants were charged with violent disorder and causing grievous bodily harm with intent.

The prosecution case depended wholly upon the evidence of the licensee of the public house. He did not see what any individual in the group around H had done but he said that the appellant, Jackson, was part of the group and later he saw Jackson with blood around his mouth. He saw the appellant, Gardner, stamp on another man's face before he left the public house but he could not attribute any specific blow to the appellant, Cape.

It was not in dispute that he knew all the appellants. The defence of each was that they were not involved in the fight although they were in the public house at the relevant time. It was their case that the licensee was lying and was motivated by malice because he bore a grudge against Gardner in particular who had cheated him over some stolen cigarettes.

All three appellants were convicted of both offences. They appealed against conviction on the ground that the judge failed to give any direction to the jury as to how to approach the question of identification evidence.

Held, dismissing the appeal, that the issue in the case was not a question of identification but of the veracity of the licensee who knew all three appellants; and that, accordingly, since a frame-up was alleged no useful purpose could be served by giving an identification warning.

WHEN THE ACCUSED ADMITS HIS PRESENCE AT THE SCENE OF THE CRIME AND HAS UNUSUAL PHYSICAL FEATURES

56.2 ***R. v. Robert Slater*** **[1995] 1 Cr App R 584**

THE FACTS

The appellant, a man of unusually large size (6 feet 6 inches and very broad) was charged with inflicting grievous bodily harm. The victim was punched whilst in a nightclub and sustained a broken jaw. He said that his attacker was a very big man who had struck him after he had objected to the man taking hold of his girlfriend.

A witness to the assault gave evidence that she had seen the attacker earlier the same evening in a public house. He was talking to her sister who was the victim's girlfriend. The girlfriend said that she had spoken to a man in the public house who later took hold of her in the night club as he walked up some stairs. A little later she saw that man, the appellant, at the top of the stairs and the victim at the bottom. The appellant told her that he had hit her boyfriend because of something he had said. Another witness heard the victim arguing with a very tall man who was threatening to hit him again. The appellant gave evidence and said that it was possible that he had spoken to the victim's girlfriend in the public house. He had gone to the nightclub where an incident had taken place but he had played no part in it.

THE APPEAL

He was convicted and appealed on the ground, *inter alia*, that the judge should have given a full *Turnbull* direction as to evidence of identification.

Held, dismissing the appeal, that the need for a full *Turnbull* direction arose where there was a possibility of mistaken identification. Such a possibility would generally arise when the issue was whether the defendant was present and a witness claimed to identify him on the basis of a previous sighting. Where, however, there was no issue as to the defendant's presence at or near the scene of the offence, but the issue was as to what he was doing, it did not automatically follow that a *Turnbull* direction must be given.

Whether such a direction was necessary would depend upon the circumstances of the particular case. The possibility of a mistake was a necessary prerequisite for an identification issue to arise such as to require a *Turnbull* direction. In the present case, the appellant was of wholly unusual size and there was no evidence to suggest that anyone else in the nightclub was remotely similar in height to him. There was no basis for any mistake. The issue was not identification but what the appellant had done. Accordingly, the judge was not required to give a *Turnbull* direction.

"It would, as it seems to us, be contrary to common sense to require a Turnbull direction in all cases where presence is admitted but conduct disputed. Purely by way of example, such a direction would not, in our view, generally be necessary if the defendant admitted he was the only person present when the complainant received his injuries, or if a woman and a man were present and the complainant said the man caused his injuries, or if a black man and a white man were present and the complainant said the white man caused the injuries, or if four men were present, three dressed in black and one in white, and the complainant said the man in white caused his injuries. Of course, in all but the first of those examples, an appropriate warning would need to be given if in a particular case, for example, the lighting was bad or there were other circumstances giving rise to the possibility of mistake. But, in our judgment, the possibility of mistake is a necessary prerequisite for an identification issue to arise such as to require a Turnbull direction.

"In the present case the appellant is of a wholly unusual size: he is six feet six inches tall and very broad. The witnesses who gave evidence in the case drew a distinction between the very tall man and the shorter man, Sulley. There was, before the jury, no evidence at all to suggest either that the absent Sulley, or anyone else present in the MGM Club, was remotely similar in height to this appellant. It follows that, in our judgment, there was no basis for any mistake. The issue here, as it seems to us, as in the case of Hope, was not identification, but what the appellant did." per Rose LJ

57 AN INCOMPLETE TURNBULL DIRECTION DOES NOT NECESSARILY MEAN THAT AN APPEAL WILL SUCCEED

***R. v. Daniel Torme* [2003] EWCA Crim 2322**

The victim of the offence was a man by name David Edwards, the landlord of the Silver Jubilee Public House. He lived in a flat above the pub, as did his business partner, Janet Murphy. Just before 2 am on 17th April 2001 they were in their beds in the flat and were disturbed by noise from outside. Both went on to the landing outside their rooms. Four men burst through the window at the end of the landing. They were all wearing balaclavas. One of them had a claw hammer. He hit Mr Edwards on the head. Another punched him to the side of the head. But their violent incursion into the premises had triggered the alarm system and all four fled empty-handed except for a set of keys. The police were called and Mr Edwards was taken to hospital. He informed an officer that he had recognised the appellant as one of his attackers, the one who had punched him on the side of the head. He later picked him out an identification parade, even though all the men in the line-up were wearing balaclavas,

Mr Edwards gave evidence that he had spoken to the appellant on numerous occasions outside the pub when he, the appellant, had caused trouble with other youths. Just before the incident he, Mr Edwards, had been almost asleep or in a state close to sleep. The lighting on the landing was very good — indeed, like the lighting in the courtroom. There were no physical obstructions to his view of the assailants, apart from the balaclavas they wore. The time that elapsed from the men smashing through the window until he was hit with the hammer was less than a minute. The blow from the

hammer made him groggy. He was terrified, overwhelmed and disorientated by the manner of the burglars' entry. The men approached almost in single file down the landing. He was not able to say whereabouts in the group the appellant was. All four of them were shouting at him at once. He was trying to respond in some way. For much of the time he was concentrating on the man with the claw hammer. The punch to the side of his head, however, caused him to turn towards the man who administered it. When he recognised him, he was sure that the man was the appellant.

The judge gave a Turnbull warning, but limited to the fact that the suspect was wearing a balaclava. He did not warn the jury about the possibility of mistakes, even in recognition cases. However, he did mention the other circumstances of the incident (such as the grogginess of the victim); and it was also clear that the defendant had changed his alibi during the very short case.

Whilst endorsing the importance of the Turnbull direction, the Court of Appeal did not think that the incomplete nature of the directions in this case made the verdict unsafe.

"We do not for one moment desire to suggest that the giving of these directions pursuant to the authority of Turnbull is not of very great importance in identification cases. What has persuaded us in the end that the incomplete nature of the Recorder's directions concerning identification does not taint the safety of the conviction is a combination of factors, namely the reference to those weaknesses in the summing-up upon which reliance is placed in other parts of the summing-up than the identification direction, the significance of the lie or putative lie told by the appellant relating to whether he had been in the pub before upon the jury's assessment of the evidence by Mr Edwards that he had recognised his assailant, the shortness of the trial and the correctness of the identification direction so far as it goes. We are in the end confident that the safety of the conviction is not impugned here. It follows that the appeal must be dismissed. We, however, emphasise again the importance of the Turnbull direction when judges are trying cases involving identification and recognition. per Law LJ at para 12

58 CRITICISM OF THE TURNBULL DIRECTION

58.1 It has been suggested that although it is assumed that a warning about weak evidence may make a jury more cautious to rely on it, the Turnbull directions might actually have the opposite effect.

i. By its very length, the direction might serve to focus attention on the suspect piece of evidence, thereby increasing its apparent significance to the jury; and

ii. When a judge feels the identification evidence needs support, s/he will emphasise the 'supporting evidence' and may thereby give it more weight, and also be seen to be suggesting the correctness of the suspect evidence.

PART FOUR: PACE Code D[22]

59 INTRODUCTION

59.1 PACE Code D provides another means of reducing the risk of miscarriages of justice deriving from mistaken identifications.

59.2 The latest version was issued in 2017, and sets out detailed procedures with which the police must comply for identification of suspects by witnesses during the investigation of crime.

59.3 ***R. v. Nethercott*** **[2011] EWCA Crim 2987**

"Ultimately, the Codes of Conduct are there because they provide safeguards not only for defendants but also for police officers investigating cases. If they are not followed, then there is a real danger that they can destabilise what might otherwise be a proper prosecution and a safe conviction."

per Roderick Evans J at para 40

60 VIDEO IDENTIFICATION

60.1 Under earlier versions of Code D, the preferred method of identification was by way of a real-life identity parade. However, advances in modern technology has no made video identification the preferred method.

60.2 In particular, the police now have access to a system called the Video Identification Parade Electronic Recording (VIPER), which is owned and run by West Yorkshire Police, who introduced it in 1997 as part of a drive against street crime[23].

60.3 This is a digital system for conducting identity parades. Rather than recruit a group of volunteers who resemble a suspect, police officers can retrieve a selection of pre-recorded video recordings of people unrelated to the case under investigation. Police officers make up a virtual parade, using clips taken from this library, and witness is then shown these, along with recordings of the current suspect. The system is used by many police forces across the UK.

60.4 The system contains clips of over 50,000 different people, which can be downloaded to police laptops to allow identification to be conducted at a witness' home. A conventional lineup would cost at least £800 and could take up to ten weeks to set up - a VIPER parade costs around £150 and can be constructed in a few minutes.

61 CODE D SUMMARY

Circumstances in which an eye-witness identification procedure must be held

61.1 **CODE D: 3.12**

If, before any identification procedure set out in paragraphs 3.5 to 3.10 has been held

(a) an eye-witness has identified a suspect or purported to have identified them; or

(b) there is an eye-witness available who expresses an ability to identify the suspect; or

(c) there is a reasonable chance of an eye-witness being able to identify the suspect, and the eye-witness in (a) to (c) has not been given an opportunity to identify the suspect in any of the procedures set out in paragraphs 3.5 to 3.10, then an identification procedure shall be held if the suspect disputes being the person the eye-witness claims to have seen on a previous occasion (see paragraph 3.0), unless:

[22] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592562/pace-code-d-2017.pdf>.

[23] <http://www.viper.police.uk/pages/demo_video.html>.

(i) it is not practicable to hold any such procedure; or
(ii) any such procedure would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence, for example where the suspect admits being at the scene of the crime and gives an account of what took place and the eye-witness does not see anything which contradicts that; or
(iii) when it is not disputed that the suspect is already known to the eye-witness who claims to have recognised them when seeing them commit the crime.

61.2 **CODE D: 3.13**

An eye-witness identification procedure may also be held if the officer in charge of the investigation, after consultation with the identification officer, considers it would be useful.

The Forbes Warning

61.3 Where there has been a breach of Code D, the judge may still admit the evidence (as long as PACE 1984 s.78 does not come into play), but should normally warn the jury about the breach and its possible consequences. This is called a 'Forbes warning' after the case of *R. v. Forbes* [2001] 1 AC 473.

61.4 ***R. v. Forbes* [2001] 1 AC 473**

The complainant, Mr. Tabassum, who had just withdrawn cash from a cashpoint machine in Ilford, was confronted by a man who attempted to rob him. The complainant evaded his assailant and returned to a waiting vehicle driven by a friend. After they had driven off, he identified his assailant, who made eye contact with him and spat towards the vehicle as it passed him. The complainant immediately contacted the police, who drove him round the streets in search of his assailant.

In due course the complainant identified the defendant, Anthony Leroy Forbes, who denied the accusation and repeatedly asked for an identification parade to be held. No such parade took place.

At trial, objection was taken to the admission of the complainant's identification evidence on the ground that the failure to hold a parade had been a breach of paragraph 2.3 of Code D, and that in consequence the evidence ought to have been excluded under section 78 of PACE. The judge ruled that since there had been a full and complete identification at the scene an identification parade was not necessary. In consequence, without exercising her discretion under section 78, she admitted the evidence and in summing up did not direct the jury as to the effect of any breach of the Code.

On the defendant's appeal against conviction the Court of Appeal concluded that there had been a breach of paragraph 2.3 but that the admission of the identification evidence and the absence of such a direction to the jury had not been unfair. They accordingly ruled that the conviction was safe and dismissed his appeal.

The defendant appealed, claiming his right to a fair trial under article 6 had been infringed and his conviction thereby rendered unsafe under section 2 of the Criminal Appeal Act 1968.

Held:

(1) Paragraph 2.3 of Code D, although not to be construed to cover every conceivable situation, imposed a mandatory obligation on police officers that, except in limited, specified circumstances, an identification parade was to be held whenever the suspect disputed an identification and he consented to the parade being held; that such a duty was not displaced where there had previously been a full and complete or unequivocal identification by the relevant witness; and that, accordingly, there had been a breach of paragraph 2.3 .

(2) The House of Lords held that any alleged infringement of a defendant's right to a fair trial, guaranteed by article 6, was to be assessed in the context of the whole history of the proceedings and where that right had been infringed the conviction would be held to be unsafe within the meaning of section 2 of the 1968 Act. In the instant case, since there had been two informal identifications of the defendant, and since the complainant's street identification had been compelling and untainted, that evidence had been rightly admitted. Where a breach of Code D was established, but the trial judge nevertheless rejected an application to exclude evidence on that account, he should explain to the jury that there had been a breach and the circumstances in which it arose and invite them to consider its possible effect.

However, in the instant case, since the absence of such a direction could not have affected the jury's verdict, the defendant's trial was not unfair nor was his conviction unsafe.[24]

The contents of a VIPER identification

61.5 The set of images must include the suspect and at least eight other people who, so far as possible, resemble the suspect in age, general appearance and position in life.

61.6 If the suspect has an unusual physical feature, e.g., a facial scar, tattoo or distinctive hairstyle or hair colour which does not appear on the images of the other people that are available to be used, steps may be taken to: (a) conceal the location of the feature on the images of the suspect and the other people; or (b) replicate that feature on the images of the other people.

For these purposes, the feature may be concealed or replicated electronically or by any other method which it is practicable to use to ensure that the images of the suspect and other people resemble each other.

[24] See also *R. v. Nazir Ahmed* [2019] EWCA Crim 1771.

L IMPROPERLY OBTAINED EVIDENCE

62 GENERAL PRINCIPLES

The Common Law Rule

62.1 At common law, the courts would generally admit any relevant evidence, however it was obtained, as long as it was reliable, subject to obvious policy restrictions such as disallowing evidence obtained by torture[25], Thus, illegal methods used to obtain evidence would not render it inadmissible unless it also reflected adversely on the fairness of the trial.

R. v. Leatham **(1861) 8 Cox C.C. 498**

"It matters not how you get it; if you steal it even, it would be admissible." per Compton J.

Kuruma v. R. **[1955] AC 197, 203**

"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle." per Lord Goddard

R. v. Sang **[1980] AC 402, 437**

"However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason." per Lord Diplock

Fox v. Chief Constable of Gwent **[1986] AC 281, 292**

"It is a well-established rule of English law, which was recognised in R. v. Sang, that (apart from confessions as to which special considerations apply) any evidence which is relevant is admissible even if it has been obtained illegally." per Lord Fraser

62.2 The leading authority on this prior to the enactment of PACE 1984, was *R. v. Sang* [1980], a case concerned with evidence obtained by way of an agent provocateur – that is, someone who tricked the defendant into committing the offence in order to have him arrested for it.

R. v. Sang **[1980] AC 402 (HL)**

The certified questions for the House of Lords were as follows:

Question 1: Has a trial judge a discretion to reject admissible evidence unfairly obtained otherwise than in cases where its prejudicial effect outweighs its probative value?

Answer 1: A judge in a criminal trial always has a discretion to refuse to admit evidence if, in his opinion, ***its prejudicial effect outweighs its probative value.*** *However, save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, the judge has* ***no*** *discretion to refuse to admit relevant admissible evidence on the ground that* ***it was obtained by improper or unfair means****, the court not being concerned with how it was obtained,*

Question 2: If he has such a discretion, is he bound in his exercise of it, to reject evidence of the commission of crime where the crime would not have been committed but for the activities of the agent provocateur?

Answer 2: It is no ground for the exercise of the discretion to exclude evidence that it was obtained as the result of the activities of an agent provocateur

[25] *R v. Secretary of State for the Home Department (No.2)* [2005] 3 WLR 1249 (HL).

THE FACTS OF THE CASE

Leonard Anthony Kimyou Sang and Matthew Mangan were jointly indicted at the Central Criminal Court before Judge Buzzard on October 13, 1977, on two counts.

The first alleged conspiracy between them and others to utter forged United States banknotes. The second alleged unlawful possession of the forged United States banknotes. To both those counts each defendant initially pleaded not guilty.

Mr. Giovene, counsel for Sang, alleged that whilst Sang was in Brixton Prison (for a different offence) he was approached by a police informer called Scippo, who tricked him into meeting up with a man called Glass after his release, and selling him some of the forged banknotes. Glass was in fact a police sergeant, and the whole thing was a set-up to get Sang to commit the crime for which he was being prosecuted. It was said that the offences would not have been committed but for the police-inspired activities of Scippo and subsequently of Sergeant Glass.

The barrister argued that since the offence had only been committed because of the activities of an agent provocateur, the evidence of such an offence should be excluded by the judge, which would mean that there was no case to answer.

THE DECISION AT THE TRIAL

The judge ruled that as a matter of law he did not possess the discretion to reject the evidence in question. Therefore, as Mr. Giovene had already hinted would be the case if the judge rejected his submissions, Sang pleaded guilty to count 1, the conspiracy count, and Mangan pleaded guilty to count 2, the possession count. These pleas were duly accepted.

The judge sentenced Sang to 18 months' immediate imprisonment and Mangan to 12 months' imprisonment suspended for two years. The judge, who was uncertain as to the correctness of his ruling on the evidence point, proffered a certificate to Mr. Giovene on Sang's behalf that Sang's case was fit for appeal. The Court of Appeal dismissed the appeal by the defendant, and the case went to the House of Lords.

THE APPEAL IN THE HOUSE OF LORDS

The House of Lords upheld the judgments of the lower courts.

1. A judge in a criminal trial always has a discretion to refuse to admit evidence if, in his opinion, its prejudicial effect outweighs its probative value.

2. However, save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, the judge has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained, and it is no ground for the exercise of the discretion to exclude evidence that it was obtained, for example, as the result of the activities of an agent provocateur.[26]

62.3 This case has caused much consternation amongst commentators as it is not clear how wide the discretion is, and in particular what is meant by ‘evidence obtained from the accused after commission of the offence’,

62.4 In practice, the common law in this area has largely been superseded by the statutory discretion to exclude evidence contained in PACE s.78. However, s.78 (2) specifically preserves the common law discretion, which technically gives the court two different discretions to exclude evidence on the grounds of unfairness.

62.5 Although unusual, the courts do sometimes explicitly apply both tests, even though the statutory rule is wider and so will cover situations caught by the common law.

[26] See, however, *R. v. Looseley: A-G’s Reference (No.3 of 2000)* [2001] 1 WLR 2060.

THE STATUTORY RULE

62.6 A similar (though not identical) effect to the common law is now reached under s.78 of PACE

PACE 1984, s78: Exclusion of unfair evidence

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence

62.7 This is considered to be a wider discretion to exclude prosecution evidence than previously existed at common law.

R. v. Cooke **[1995] Crim LR 497** (see 4.6 below)

"Until the Police and Criminal Evidence Act 1984 came into force, the discretion of the court not to admit evidence which, though improperly obtained, was nevertheless relevant to and admissible in the proceedings was strictly circumscribed. (See the decision of the House of Lords in R. v. Sang (1979) 69 Cr.App.R. 282, [1980] A.C. 402 , following the decision of the Privy Council *in Kuruma v. R. [1955] A.C. 197).*

"However, despite some expressions of opinion to the contrary, it is now clear that section 78 has given the courts a substantially wider discretion to refuse to admit evidence improperly obtained."
per Glidewell LJ

62.8 Section 78 seems to give the court more leave to exclude improperly obtained evidence than at common law, as it expressly invites the court to consider 'the circumstances in which the evidence was obtained'.

EFFECT OF ARTICLE 6

62.9 In addition, under s.3 of the Human Rights Act 1998, English legislation must be interpreted as far as possible to be compatible with the European Convention on Human Rights. This includes Article 6, which gives the right to a fair trial, including the pretrial phase of the proceedings. Thus, in considering s.78, the court must also take into account the more general rights under Article 6.

Beghal v. DPP **[2016] AC 88 (SC)**

"Even without the direct application of article 6 of the Convention the outcome of the section 78 judgment is effectively inevitable. Once article 6, directly binding on a court under section 6(3) of the Human Rights Act 1998 , is brought into the equation, there is simply no room for any contrary conclusion, for, as is shown by Saunders v United Kingdom (1996) 23 EHRR 313, article 6 has the effect that any use in a criminal prosecution of answers obtained under compulsion of law will be a breach of the right to a fair trial. The presence or absence of other evidence implicating the defendant is irrelevant to this proposition." per Lord Hughes at para 66

62.10 ***PG and OH v. United Kingdom*** **[2002] Crim LR 308**

"While Art.6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence—for example, unlawfully obtained evidence—may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair." para 76

63 RELEVANCE

63.1 The most fundamental aspects of evidence are that it must be relevant and reliable, and the judge has the general discretion to exclude any evidence which does not meet those criteria.

63.2 Relevance refers to any item of proof that renders a fact in issue either more probable or less probable.

63.3 Sir James Fitzjames Stephen (1829-1894) was a celebrated Victorian judge who explained relevance as follows:

"Any two facts to which it is applied are so related to each other that according to the common cause of events, one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence of the other."

63.4 ***DPP v. Kilbourne*** **[1973] AC 729**

"Your Lordships have been concerned with four concepts in the law of evidence: (i) relevance; (ii) admissibility; (iii) corroboration; (iv) weight. The first two terms are frequently, and in many circumstances legitimately, used interchangeably; but I think it makes for clarity if they are kept separate, since some relevant evidence is inadmissible and some admissible evidence is irrelevant (in the senses that I shall shortly submit).

"Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. I do not pause to analyze what is involved in "logical probativeness", except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.

"To link logical probativeness with relevance rather than admissibility (as was done in Sims) not only is, I hope, more appropriate conceptually, but also accords better with the explanation of Sims given in Harris v. Director of Public Prosecutions [1952] A.C. 694, 710. Evidence is admissible if it may be lawfully adduced at a trial. "Weight" of evidence is the degree of probability (both intrinsically and inferentially) which is attached to it by the tribunal of fact once it is established to be relevant and admissible in law (though its relevance may exceptionally, as will appear, be dependent on its evaluation by the tribunal of fact)." per Lord Simon at p.756

63.5 ***R. v. Randall*** **[2004] 1 WLR 56**

Relevance

"The theme that ran through the Crown's case and oral argument was that evidence of Glean's propensity to violence "proves nothing". Taken in isolation that is right. But relevance in cases such as the one under consideration is a more subtle concept…

"A judge ruling on a point of admissibility involving an issue of relevance has to decide whether the evidence is capable of increasing or diminishing the probability of the existence of a fact in issue. The question of relevance is typically a matter of degree to be determined, for the most part, by common sense and experience." per Lord Steyn at para 20

63.6 As Lord Steyn suggests, relevance is not an exact science. There is no calibrated scale which indicates the exact point at which the significance of a piece of evidence becomes too speculative to justify its admission. It is largely just a matter of common sense.

63.7 ***R. v. Wilson (Jamie)*** **[2008] EWCA Crim 1754**

Wilson was convicted on seven counts of robbery.

Over the period of one month, seven women had been robbed in the street by a masked man carrying a knife. Only the robber's eyes and top of his nose had been visible. Days after the last robbery, police officers observed Wilson in the area where the robberies had taken place. His clothing matched the description of the robber. W was followed, stopped and searched and a large kitchen knife and a telephone were found under his top. It was discovered that W lived in a flat nearby and a search recovered property belonging to three of the complainants.

At trial evidence from a criminal intelligence analyst who monitored crime in the relevant area was adduced. She stated that her research showed there had not been any robberies in the area since W's arrest.

Wilson submitted that the evidence of the analyst should not have been admitted because it was not relevant and was highly prejudicial.

HELD: The evidence of the analyst was probative as it would have been helpful if the jury was speculating whether the robberies continued after W's arrest.

The evidence was not unfairly prejudicial. The jury were always able to dismiss the evidence and decide for themselves that it was not useful. The defence case focused on the differences between the descriptions of W. If the jury had accepted those arguments, that would have undermined the evidence of the analyst. The jury were able to consider what inference, if any, they could draw from the analyst's evidence. The judge did not err in her ruling and there were no criticisms with the way she dealt with the evidence in her summing up. The appeal against conviction was dismissed.

64 RELIABILITY

64.1 Although s.78 does not specify that it is underpinned by the reliability principle, that is how it has generally been interpreted.

64.2 ***R. v. Looseley: A-G's Reference (No.3 of 2000)*** **[2001] 1 WLR 2060**

During the course of an authorised police operation relating to the trade in class A controlled drugs, an undercover police officer was at a public house which was a focus of the operation when he was given the defendant's name and telephone number as a potential source of drugs.

The officer telephoned the defendant, who confirmed that he could obtain drugs. After they had agreed a price for the supply of heroin, the defendant took the officer to an address where the defendant obtained a quantity of heroin and gave it to the officer in exchange for the agreed sum. On two further occasions the officer contacted the defendant and bought two more quantities of heroin from him.

The defendant was charged with supplying or being concerned in the supplying to another of a class A controlled drug, contrary to section 4 of the Misuse of Drugs Act 1971.

At his trial a *voir dire* was held on a preliminary issue, and the defence submitted that the indictment should be stayed as an abuse of the process of the court or, alternatively, that the officer's evidence should be excluded pursuant to the judge's discretion under section 78 of the Police and Criminal Evidence Act 1984. The judge declined either to stay the indictment or to exclude the evidence. The defendant then changed his plea to guilty. The Court of Appeal upheld the judge's ruling on the *voir dire* and dismissed the defendant's appeal against conviction.

HELD:

(1) that the court was required, when exercising its discretion to exclude evidence pursuant to section 78 of the 1984 Act and its inherent jurisdiction to stay proceedings as an abuse of process, to balance the need to uphold the rule of law by convicting and punishing those who committed crimes and the need to prevent law enforcement agencies from acting in a manner which constituted an affront to the public conscience or offended ordinary notions of fairness; that each case depended on its own facts and, when identifying the limit to the types of police conduct which were acceptable, the principle to be applied was that it would be unfair and an abuse of process if a person had been lured, incited or

pressurised into committing a crime which he would not otherwise have committed; but that it would not be objectionable if a law enforcement officer, behaving as an ordinary member of the public would, gave a person an unexceptional opportunity to commit a crime, and that person freely took advantage of the opportunity.

(2) Dismissing the defendant's appeal, that the evidence showed that the undercover officer did no more than to present himself as an ordinary customer to an active drug dealer and there was nothing in the officer's conduct which constituted incitement; and that, accordingly, the trial judge had been entitled to refuse to stay the proceedings as an abuse of the process of the court or to exclude the officer's evidence under section 78 of the Act.

"The phrase "fairness of the proceedings" in section 78 is directed primarily at matters going to fairness in the actual conduct of the trial; for instance, the reliability of the evidence and the defendant's ability to test its reliability. But, rightly, the courts have been unwilling to limit the scope of this wide and comprehensive expression strictly to procedural fairness." per Lord Nicholls at para 12

65 FAIRNESS

65.1 Even if evidence is relevant, and does not fall foul of any of the exclusionary rules, this does not guarantee that it is admissible. The court possesses a residual discretion to exclude otherwise admissible evidence on the basis of fairness (expressed in various ways)

65.2 It has long been recognised at common law that trial judges have a general discretion in order to exclude evidence which is technically admissible if they feel that its prejudicial effect exceeds its probative value.[27]

65.3 As mentioned above, s.78 of PACE extends this discretion.

PACE 1984, s78: Exclusion of unfair evidence

(3) in any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence

65.4 'Fairness' traditionally means fairness to the accused, so the court will primarily consider whether serious procedural breaches of the rule have occurred that deprive an accused of important rights.

***R. v. Nathaniel* (1995) 159 JP 419**

Lonsdale Nathaniel appealed against conviction for rape. He was not arrested for the offence until four years after its occurrence when DNA samples taken from him in relation to another case were matched with the previous offence. On arrest, N agreed to a hair sample being taken, but he refused the taking of further intimate samples on legal advice. Experts differed as to the impact of the DNA evidence.

The main ground for appeal was that the DNA evidence should have been excluded. The DNA samples had been taken in relation to another rape case of which he had been acquitted. Under the Police and Criminal Evidence Act 1984 s.64 , any samples taken from a person should be destroyed if that person is subsequently acquitted. It was conceded by the Crown that such samples included DNA samples.

Held: Appeal allowed.

Although evidence obtained unlawfully can be admissible at the trial judge's discretion under s.78 of the 1984 Act, in this case there was not only a breach of s.64 but N had been misled as to the use of the samples, and told that they would be destroyed.

[27] *R. v. Sang* [1980] AC 402.

Despite the hair sample being properly admitted in terms of s.78 of the 1984 Act, the blood sample was not and its wrongful admission was fatal to the prosecution's case.

65.5 Alternatively, 'the fairness of the proceedings' has been stated to mean 'both fairness to the accused persons and fairness to the public good, as represented by the Crown.' Taken in this wider sense, in exercising its discretion the court naturally inclines to treating reliability as the determining factor.

65.6 ***R. v. Cooke*** **[1995] 1 Cr App R 318**

Stephen Cooke appealed against his conviction of rape and kidnapping. The identification had depended on a comparison of DNA taken from semen on the complainant and DNA taken from a hair plucked from C's head. This had been taken at a police station without the appropriate consent. C argued that the evidence was inadmissible on the basis that the only part of the hair which could provide DNA was the sheath around its base which was extracted from the scalp when the hair was pulled. C contended that the sheath was an intimate sample and was not covered by the provisions relating to the actual hair under the Police and Criminal Evidence Act 1984 s.65.

Held: Appeals dismissed.

A sample of hair plucked from the scalp of a person in police detention without his consent was a non-intimate sample as defined by section 65 of the Police and Criminal Evidence Act 1984. Accordingly, its taking was authorised by section 63(3) of that Act, subject to the statutory procedural requirements. Whilst a consultant dermatologist called by the prosecution agreed that a hair and its sheath were separate entities, he also said that a plucked hair had cells on its surface within which there was DNA. Thus, hair obtained by pulling provided material from which DNA profiles could be prepared. Accordingly, the judge had been right to rule as he did.

Further, even if the whole of the sample of hair was not authorised to be obtained by sections 63 and 65 of the Act, the judge was still right not to exercise his discretion under section 78 of the 1984 Act to exclude the evidence which it provided and which resulted from it as there was nothing about the method of obtaining the evidence which made it unreliable.

THE DISCIPLINARY PRINCIPLE

65.7 One aspect of fairness might be that the police who have obtained evidence illegally ought to be penalized by not having the evidence admitted, even it is otherwise reliable. Although the courts have sometimes censured the police for their bad behaviour, it is in fact very unusual for this to be given as a reason for disallowing evidence.[28]

65.8 ***R v. Mason (Carl)*** **[1988] 1 WLR 139**

THE FACTS

The police had reason to suspect that Carl Mason (aged 20) had set fire to Mr. Askew's car by way of throwing an inflammable liquid at it. Before that incident there had been bad feeling between Mason and Mr. Askew. Mr. Askew had a daughter who was 18 years of age with whom the appellant had been going out. She became pregnant by him. She was not willing to bear his child. She decided to have an abortion and she did. She also broke off her relationship with the appellant. He did not take that at all well. His erstwhile girlfriend's father and mother did not look upon what had happened with any great favour either; nor did they feel any pleasure in seeing Mason any more. They began to receive midnight telephone calls. Upon each occasion they answered the telephone, whoever was at the other end put the receiver down. They suspected Mason of making those calls.

About 12 hours after the fire, the police visited Mason, who denied all knowledge of the incident. He was arrested 9 days later, despite the fact that the police had in their possession no evidence at all to associate him with the cause of the fire. However, before the arrest, one or more police officers decided to invent evidence and to acquaint Mason of that so-called evidence as though it was genuinely possessed. What they decided to do was to tell the appellant that a fingerprint of his had been found in a very telling place.

[28] *R. v. Nathaniel* (1995) 159 JP 419.

As to that, Detective Constable Gunton said:

“Detective Constable Walton and I set out deliberately to make the defendant believe we had a fingerprint on some of the glass fragments from the bottle that was used to perpetrate this crime. I agreed with the detective constable to this play-acting and it was a trick. The bottle, or the fragments of it, had not even been sent for fingerprint testing at that stage. We set about ‘conning’ the defendant. We had a suspicion, but only suspicion against him and we realised that we needed more proof … I felt the only way to get the truth from him was to do this.”

Having been told by these police officers, falsely, that a fingerprint of his had been found on a fragment of glass from the bottle, Mason saw his solicitor and told him his version of what had happened. The solicitor asked D.C. Gunton to confirm the fact, as the police were asserting, that they had found a fingerprint upon a fragment of glass at the scene of the crime. He confirmed to the solicitor that that was so. That was a deliberate falsehood.

When giving evidence D.C. Gunton said: “My motive … was because if the defendant had had nothing to do with this glass bottle there was no way he would produce a confession. If he … knew very well he had handled … the bottle and been active in the preparation, of course, he would begin to doubt himself and whether or not he was going to be discovered.”

The solicitor, influenced by what he had been told by the police as to the fingerprint, advised the appellant to answer their questions and to give his explanation of any involvement he had had in the incident. What he told the police as a consequence of that was that he was not present when the car was set alight. He had asked a friend, whom he refused to name, if he would do it. This was because Mr. Askew had been threatening him, and setting fire to his car would frighten Mr. Askew away from repeating conduct of that kind. The only involvement which he (the appellant) had in the incident was to fill the bottles which were used, one with petrol and the other with paint thinners. That was done at his home. The bottles were then taken away by the friend and the fire started.

The trial judge ruled that, as the appellant was aware of his right to remain silent with the solicitor present and chose to answer all the questions, nothing adversely affected the fairness of the proceedings. The confession was admitted in evidence, the prosecution adduced no further evidence against the appellant, he gave no evidence and he was convicted. His appeal against conviction was resisted on the ground that section 78 was inapplicable to confessions because section 76 was especially concerned with them.

Held: Appeal allowed.

The word “evidence” in section 78(1) included all the evidence which might be introduced into the trial by the prosecution; so that, in considering the admissibility of a confession, the trial judge had a discretion under section 78(1) to exclude a confession in the interests of the fairness of the trial, regardless of whether the confession fell to be considered under section 76(2) ; and that, in the circumstances, since the trial judge had omitted from his consideration the vital factor that the police had practised deceit on the appellant's solicitor, the conviction had to be quashed.

“It is obvious from the undisputed evidence that the police practised a deceit not only upon the appellant, which is bad enough, but also upon the solicitor whose duty it was to advise him. In effect, they hoodwinked both solicitor and client. That was a most reprehensible thing to do. It is not however because we regard as misbehaviour of a serious kind conduct of that nature that we have come to the decision soon to be made plain. This is not the place to discipline the police. That has been made clear here on a number of previous occasions. We are concerned with the application of the proper law.” per Watkins LJ at p.144

THE RIGHTS BASED PRINCIPLE

65.9 There are rare instances of exclusion under s.78 simply on the basis of the infringement of the accused's rights, even though the breach has no effect on the reliability of the evidence.

65.10 ***DPP v. Godwin*** **[1991] RTR 303**

Section 6 of the Road Traffic Act 1988 provides:

'(1) Where a constable in uniform has reasonable cause to suspect – (a) that a person driving … a motor vehicle on a road … has alcohol in his body … he may … require him to provide a specimen of breath for a breath test … (5) A constable may arrest a person … if … (b) that person has failed to provide a specimen of breath for a breath test when required to do so in pursuance of this section and the constable has reasonable cause to suspect that he has alcohol in his body …'

William Godwin, a motorist who was driving on a road, was stopped by a police constable carrying out traffic stop checks and was instructed to pull into a lay-by. The constable asked the defendant if he had been drinking and he said that he had not.

Godwin failed to provide a specimen of breath for a breath test and was arrested for failure to provide the specimen, contrary to section 6(5)(b) of the Road Traffic Act 1988. He was cautioned and taken to a police station, where he was required, in accordance with section 7(1) of the Act of 1988, to provide specimens of breath for analysis, which he did and analysis revealed 96 microgrammes of alcohol in 100 millilitres of breath.

He was charged with driving in contravention of section 5(1) .

The justices were of opinion that, in the absence of evidence to the contrary, the constable had no reasonable cause to suspect alcohol in the defendant's body before the request for him to take a breath test, that his arrest was unlawful and that, albeit the unlawful arrest would not automatically exclude evidence of the police station procedure, and although a lawful arrest was not an essential prerequisite to a requirement of breath for analysis, they had a discretion, under section 78(1) of the Police and Criminal Evidence Act 1984, to exclude the breath analysis evidence.

In the exercise of their discretion, they excluded the evidence and dismissed the charge.

On appeal by the prosecutor on the ground that the justices' discretion under section 78 of the Act of 1984 to exclude the evidence should not have been exercised in the absence of bad faith by the police or oppressive conduct by the prosecuting authorities:

Held: Appeal dismissed.

It was unnecessary for the justices to be satisfied that the police or prosecuting authorities had acted in bad faith or oppressively for the discretion under section 78 to be exercised, for the statutory discretion was phrased in general terms. and that, since the defendant was denied the protection afforded by section 6 of the Act of 1988 and the prosecutor had thereby obtained evidence which he otherwise would not have obtained, the defendant was significantly prejudiced in resisting the charge against him.

The justices were entitled to exclude the evidence in their discretion and having directed themselves accurately and correctly in law, the court on appeal could not impugn their decision.

65.11 On that point, notice that even if a confession passes the admissibility tests in s.76, it might still be excluded as unfair under s.78.[29]

[29] *R v. Mason (Carl)* [1988] 1 WLR 139.

66 DISCRETION

66.1 The 'discretion' of the judge in this context has a particular meaning. It does not imply an absolute freedom on the judge to do whatever he or she thinks best, but it is controlled and reviewable, so its exercise may be challenged.

66.2 In particular, if a judge has decided that the admission of an item would reflect adversely on the fairness of the proceedings, that evidence must be excluded. It is not a matter of choice – or 'discretion' – in the usual sense.

66.3 ***Beghal v. DPP*** **[2016] AC 88 (SC)**

"It is to be accepted as a general proposition that reliance on a judicial discretion is not to be equated, for a prospective defendant, with the exercise of his privilege against self-incrimination… But the section 78 controlling power, vested in the trial judge in criminal proceedings, is not sufficiently described as a matter of discretion. It is a matter of judgment. If in practice the outcome of the exercise of that judgment is inevitably that the evidence will be excluded, then the real and appreciable risk which the privilege against self-incrimination exists to guard against is not present. The circumstances in which the evidence was obtained are a central consideration in the exercise of the section 78 judgment. Evidence obtained from the defendant himself (or his spouse) by means of legal compulsion is a classic case of evidence which it will be unfair to admit." per Lord Hughes at para 66

67 HORRIFIC EVIDENCE

67.1 An example of when a court might exclude evidence on the grounds of its extremely prejudicial effect, is when it is gratuitously gruesome or distasteful, such as photographs of murder victims or of children being abused.

67.2 ***R. v. Shankly*** **[2004] EWCA Crim 1224**

"The photograph in question shows a very bloodied head of someone wearing a breathing mask. It was taken at the A and E department of the hospital while attempts were being made to save the life of the deceased. It had been agreed between counsel that the photograph should not go before the jury. Two reasons are sometimes given for making such a decision in relation to unpleasant photographs of wounds and other injuries. The first is a fear that the photograph may inflame the jury against the defendant and the second is that the photographs may subject the jury to an unpleasant experience which they need not undergo and which might distract them from the issues they have to consider. We are not surprised that this document did not go into the jury bundle of documents, copies of which we have, though our conclusion is that the important and underlying reason for that is that the photograph simply would not help the jury on an issue in the case." per Pill LJ at para 21

67.3 ***R v. D, P and U*** **[2013] 1 WLR 676**

This is a case on the admissibility of bad character evidence.

In three separate cases the defendants were charged with offences involving the sexual abuse of children which had occurred over a substantial period. Each defendant denied any sexual contact with the children. In each case the judge admitted evidence that the defendant had viewed and/or made indecent photographs of children, relying on the bad character provisions of section 101(1) of the Criminal Justice Act 2003 . All three defendants were convicted.

On the defendants' appeals against conviction—

Held: Appeals dismissed.

Where a defendant was charged with any prohibited sexual activity involving children, evidence that he possessed the relatively unusual character trait of having a sexual interest in children made it more likely that the allegation of the child complainant was true.

Therefore, evidence that a defendant to such a charge had viewed or collected child pornography was capable of being admissible pursuant to section 101(1)(d) of the Criminal Justice Act 2003 as evidence which was relevant to an important matter in issue between the defendant and the prosecution.

Although it did not follow that it was automatically admissible, in all the circumstances of this case, the evidence that the defendant had viewed and/or made indecent photographs of children had been properly admitted against him pursuant to section 101(1)(d) of the 2003 Act, as demonstrating a sexual interest in children.

On the subject of the admissibility of horrific pictures, Hughes LJ said this:

"In none of the cases before us were the photographs in fact actually shown to the jury. It seems to us that that is a sensible practice which should generally be adopted. It is unnecessary that the jury should see the photographs and it would carry the risk, if they did, that some at least might find it difficult to avoid the effects of distaste. It seems to us likely that in most cases a suitable description of the general contents of the photographs which had in fact been found can be agreed and presented to the jury. Care should be taken that that description should be as neutral and dispassionate as possible. In one of the cases before us the jury was given, by agreement, the descriptions of category of pictures to be found in the Combating Paedophile Information Networks in Europe scale ("COPINE"). That is one way of doing it, but it seems to us better as a general proposition if what the jury is told by agreement is linked to the photographs actually found, rather than to a more generalised description of categories." per Hughes LJ at para 11

68 ENTRAPMENT

68.1 There is no rule in England (as there is in the USA) that evidence obtained by unlawful entrapment or undercover operations is inadmissible. However, where the police induce someone to commit a crime – rather than simply present them with the opportunity to do so – this can amount to an abuse of the court's process, and the prosecution might be stayed.

68.2 The leading authorities on this are *R. v. Looseley* and *A-G's Reference (no 3 of 2000)*, which were heard together by the House of Lords in 2001, and which throw some doubt on the decision in *R. v. Sang*.

68.3 ***R. v. Looseley: A-G's Reference (No.3 of 2000)*** **[2001] 1 WLR 2060** (see 3.2 above for facts)

The House of Lords laid down the following principles:

- Entrapment is not a substantive defence, but where an accused can show entrapment, the court may stay the proceedings as an abuse of the court's process, or it may exclude evidence under s.78.

- As a matter of principle, a stay of the proceedings rather than exclusion of evidence should normally be regarded as the appropriate response. A prosecution founded on entrapment would be an abuse of the court's process. Police conduct which brings about state-created crime is unacceptable and improper and to prosecute in such circumstances would be an affront to public conscience.

- In deciding whether conduct amounts to state-created crime, the existence or absence of a predisposition on the part of the accused to commit the crime is not the criterion by which the acceptability of police conduct is to be decided, because it does not make acceptable what would otherwise be unacceptable conduct on the part of the police or negative misuse of state power.

- A useful guide is to consider whether the police did no more than present the accused with an unexceptional opportunity to commit a crime, rather than to increase the incidence of crime by artificial means.

- Usually a most important factor, though not necessarily decisive, will be whether an officer can be said to have caused the commission of the offence, rather than merely providing an opportunity for the accused to commit it with an officer.

68.4 ***Nottingham City Council v. Amin*** **[2000] 1 WLR 1071**

Mohammed Amin, a taxicab driver licensed by the local authority under section 37 of the Town Police Clauses Act 1847, was hailed by two plain-clothes police officers while driving in an area not covered by his licence. Although at the time the roof light on his cab was not illuminated, he stopped and took the officers to the requested address in return for a fare. An information was laid against him under section 45 of Act of 1847 for using his vehicle to ply for hire when he had not previously obtained a licence under section 37 of that Act.

At the hearing, the stipendiary magistrate adjourned an application by the defendant for the exclusion of the police officer's evidence under section 78 of the Police and Criminal Evidence Act 1984 and proceeded to hear the case. He rejected the defendant's evidence that he had mistakenly believed that he was collecting a pre-arranged hire and had sought to identify the passengers, but ruled that having regard to the effect of article 6 of the Convention for the Protection Human Rights and Fundamental Freedoms[1] the evidence of the police officers, whom he described as agents provocateurs, should be excluded under section 78.

He accordingly dismissed the information.

On appeal by the local authority: -

Held: Appeal allowed. The matter was remitted with a direction to convict:

(1) That in describing the officers as agents provocateurs the stipendiary magistrate had wrongly treated as a primary fact a central issue for his determination; that entrapment was no defence to a criminal charge and, while it was offensive to the concept of fairness that a defendant should be convicted and punished in respect of a crime committed solely because he had been incited or pressurised to do so by a law enforcement officer, such an officer had a public duty to enforce the law and it was unobjectionable if he gave a defendant an opportunity to break it in circumstances where the defendant freely did so and would have done the same if the opportunity had been offered by another.

(2) That, in exercising the court's discretion under section 78, the court should take account of the United Kingdom's international obligations under the Convention; that the fairness of a defendant's trial, guaranteed by article 6 , was to be judged by reference to the fairness of the proceedings as a whole, not of a subordinate procedure taken in isolation; that by hailing the cab the officers could not be regarded as prevailing on, inciting or pressuring the defendant to commit the offence, and the admission of their evidence could not be considered as rendering the proceedings as a whole unfair; and that, accordingly, the stipendiary magistrate had wrongly considered that on the facts found the effect of that evidence would be to deny the defendant a fair trial.

"It has been recognised that law enforcement agencies have a general duty to the public to enforce the law and it has been regarded as unobjectionable if a law enforcement officer gives a defendant an opportunity to break the law, of which the defendant freely takes advantage, in circumstances where it appears that the defendant would have behaved in the same way if the opportunity had been offered by anyone else." per Lord Bingham at p.1077

68.5 ***R. v. John Shannon*** **[2001] 1 WLR 51**

John Shannon (also known as the actor, John Alford) was charged with supplying drugs to a journalist (Mazher Mahmood), a journalist who had worked for the "News of the World", posing as an Arab sheikh in an elaborate stratagem to obtain evidence of drug offences against him.

Prior to the trial, the judge held a *voir dire* to determine an application by the defendant to exclude all the prosecution evidence on the ground that it was agent provocateur evidence unfairly obtained, contrary to section 78 of the Police and Criminal Evidence Act 1984, which deprived the defendant of a fair trial guaranteed by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms .

The judge ruled that the evidence was admissible. The defendant was subsequently convicted of supplying small quantities of cocaine and cannabis resin.

On the defendant's appeal against conviction—

Held: Appeal dismissed.

On an application under section 78 to exclude evidence on the grounds of entrapment, while the facts and circumstances of such entrapment might be taken into account and might in an appropriate case prove decisive, the principal focus of the judge's attention had to be upon the fairness of the proceedings, the nature and reliability of the prosecution evidence and the fullness and fairness of the opportunity available to a defendant to deal with the evidence which the prosecution sought to adduce.

There was no general rule requiring a court on grounds of fundamental fairness not to entertain a prosecution at all in cases of incitement or instigation by an agent provocateur, regardless of whether the trial as a whole could be a fair one in the procedural sense. The judge found correctly that the evidence fell short of establishing actual incitement or instigation of the offences concerned and that in any event the admission of the evidence would not have an adverse effect on the procedural fairness of the trial.

Accordingly, the judge did not err in exercising his discretion to refuse the defendant's application under section 78.

"That passage and the authorities therein cited, make it clear in our view that, in the case of applications under section 78 to exclude evidence on the grounds of entrapment, while the facts and circumstances amounting to such entrapment may be taken into account (and in an appropriate case may prove decisive), the principal focus of the judge's attention must be upon the procedural fairness of the proceedings, the nature and reliability of the prosecution evidence and the fullness and fairness of the opportunity available to the defendant to deal with the evidence which the prosecution seeks to adduce. Thus, the question whether section 78 has effectively introduced a defence of entrapment into English law is not susceptible of an unqualified answer. It is plain that in ***R v Smurthwaite*** *[1994] 1 All ER 898, the court contemplated that an affirmative answer to the question whether the defendant was "enticed" to commit an offence was a key consideration for the judge when considering whether to exclude the evidence thus obtained. However, it was not in itself sufficient to* require *exclusion without careful consideration of the further questions posed, together with any special considerations arising in the particular case which might affect the fairness of the proceedings. The present state of English authority remains that the exercise of the judge's discretion is concerned with, and constrained by, the effect on the fairness of the proceedings in the procedural sense, bearing in mind that entrapment, as such, is not a defence in English law.*

"That being so, the ultimate question is not the broad one: is the bringing of proceedings fair (in the sense of appropriate) in entrapment cases. It is whether the fairness of the proceedings will be adversely affected by admitting the evidence of the agent provocateur or evidence which is available as the result of his action or activities. So, for instance, if there is good reason to question the credibility of evidence given by an agent provocateur, or which casts doubt on the reliability of other evidence procured by or resulting from his actions, and that question is not susceptible of being properly or fairly resolved in the course of the proceedings from available, admissible and "untainted" evidence, then the judge may readily conclude that such evidence should be excluded. If, on the other hand, the unfairness complained of is no more than the visceral reaction that it is in principle unfair as a matter of policy, or wrong as a matter of law, for a person to be prosecuted for a crime which he would not have committed without the incitement or encouragement of others, then that is not itself sufficient, unless the behaviour of the police (or someone acting on behalf of or in league with the police) and/or the prosecuting authority has been such as to justify a stay on grounds of abuse of process."

per Potter LJ at paras 38 and 39

69 BREACHES OF PACE CODES

69.1 Even where Parliament has prescribed a particular method of obtaining evidence, police failure to comply with these rules will not necessarily lead to an exclusion of the evidence. The court may need to decide if an automatic exclusion was the intention of Parliament (as it is in some confession cases under PACE s.76).

69.2 ***Public Prosecution Service of Northern Ireland v. Elliott*** **[2013] 1 WLR 1611 (SC)**

The defendants, William Elliott and Robert McKee, were arrested in Northern Ireland on suspicion of theft of building materials. They were taken to the police station where their fingerprints were taken by an electronic device. A fingerprint matching one of the defendant's left thumb was found on the packaging of the stolen materials. The defendants were charged with theft.

At the magistrates' court, the prosecution relied on the match of fingerprints and the defendants were convicted. Subsequently, the defendants realised that the device used to take their fingerprints had not been approved for use by the Secretary of State, as required, at the time, by article 61(8B) of the Police and Criminal Evidence (Northern Ireland) Order 1989, as inserted, and they appealed to the county court. At a preliminary hearing, the judge ruled that the fingerprint evidence was inadmissible. The Court of Appeal in Northern Ireland allowed the prosecution's appeal, holding that the fingerprint evidence was admissible.

On the defendants' appeal—

Held: Appeal dismissed.

In the absence from article 61(8B) of the 1989 Order of an express provision, for which there was ample precedent, that fingerprint evidence should **only** be admissible if obtained using an approved device, it was necessary to consider what Parliament intended to be the consequence of using a non-approved device.

The article was enacted against the background of the general common law rule, of which Parliament had to be taken to have been well aware, that evidence which had been unlawfully obtained did not automatically thereby become inadmissible. The clear statutory purpose of preventing the use of a device unless it was approved by the Secretary of State was achievable irrespective of the admissibility of evidence obtained from an unapproved device and the legislative history did not suggest that Parliament intended that inadmissibility should be the consequence of using an unapproved device.

69.3 On the other hand, if there have been significant and substantial breaches of the rules, the court will exclude the evidence if it considers that its admission would adversely on the fairness of the proceedings.

69.4 ***Regina v. Keenan*** **[1990] 2 QB 54**

The appellant was driving a motor car, which he had bought that day, when he was stopped and arrested by police officers for motoring offences. Additionally, he was charged with possessing an offensive weapon, which had apparently been found in the car when it was searched by police officers, and was committed for trial on that offence alone.

At the trial, on a *voir dire*, objection was taken to the admissibility of certain questions and answers in a police station interview, on the grounds of contraventions of the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code C) in that (i) no record had been made during the course of the interview, (ii) no reason for that omission had been recorded in the officer's pocket book and (iii) the appellant had not been given the opportunity to read the record of the interview and to sign it as correct or to indicate the respects in which he considered it inaccurate. No objections or admissions were made as to the truth or fact of the questions and answers at the time the question of admissibility was raised. The trial judge ruled that the questions and answers were admissible. The appellant was convicted.

On appeal on the grounds that the questions and answers had been wrongly admitted in evidence:

Held: Appeal allowed.

There had been plain breaches of Code C and the trial judge had been wrong to assume that any unfairness could be remedied by the appellant giving evidence as, not having been apprised of all the facts, the trial judge could not have known the effect of admitting the evidence at the time of his ruling.

If the appellant had intended not to give evidence if the questions and answers had been excluded, then admitting them unfairly deprived him of his right to remain silent. If the defence was (as it transpired) that the evidence was concocted, it was unfair to admit it as that forced the appellant not only to give evidence, but also to put his character in issue by attacking the police evidence.

If the defence was that the interview had been inaccurately recorded, it was unfair to admit it as it placed the appellant at a substantial disadvantage in that he had had no contemporaneous opportunity to correct any inaccuracies nor any contemporaneous note of what he had said.

In all the circumstances, the evidence of the questions and answers had been wrongly admitted and that, accordingly, the conviction must be quashed.

Per curiam. Not every breach or combination of breaches of the codes will justify the exclusion of interview evidence under section 76 or section 78 . They must be significant and substantial.

"We think that in cases where there have been "significant and substantial" breaches of the "verballing" provisions of the code, the evidence so obtained will frequently be excluded. We do not think that any injustice will be caused by this. It is clear that not every breach or combination of breaches of the codes will justify the exclusion of interview evidence under section 76 or section 78. They must be significant and substantial. If this were not the case, the courts would be undertaking a task which is no part of their duty: as Lord Lane C.J. said in R. v. Delaney, The Times, 30 August 1988 *: "It is no part of the duty of the court to rule a statement inadmissible simply in order to punish the police for failure to observe the Codes of Practice."* per Hodgson J. at p.69

70 COVERT RECORDING

70.1 Evidence obtained through covert recordings is generally admissible in evidence as long as it is voluntary, authentic, probative and relevant.

70.2 ***R. v Jason Gregory Bailey, R. v Steven Simon Smith*** **[1993] 97 Cr App R 365**

THE FACTS OF THE CASE

On July 3, 1991, two appellants were convicted and sentenced as follows:

- Jason Bailey, on each of three counts of robbery, seven years' detention in a young offender institution concurrent *inter se* and concurrent also with a term already being served for grievous bodily harm;

- Steven Smith, on a single count of robbery, four years' imprisonment.

Their appeal concerned the admissibility in evidence of a number of highly incriminating remarks, tantamount to admissions of guilt, made and tape-recorded during the course of conversations between these appellants whilst they were sharing a bugged cell at a police station after being arrested, charged and remanded into police custody.

The first robbery, of which both appellants were convicted, took place on May 29, 1990, at the Sun Valley Amusement Arcade at Nottingham. The Arcade was raided by four men—identifiable only as black and by their clothing—who threatened the employees with an axe and cosh, handcuffed them, locked them in the lavatory, rifled the safe and gaming machines, and eventually, when police arrived, fled with over £3,000 in cash (another £3,500 being left behind in a holdall), three of the men in a stolen car, the fourth, the appellant Smith, on foot to a nearby outhouse where he then hid.

The other two robberies of which Bailey was convicted took place within a quarter of an hour of each other on June 4, 1990. Each involved a second, unidentified man as well as Bailey. In each the shopkeeper was threatened—in one case with an imitation firearm, in the other the shopkeeper herself being kicked and her son punched in the face. Each involved money being stolen from the till—£150 from the first shop, nearly £4,000 from the second.

Apart from the contested tapes, there was a good deal of evidence against Bailey, evidence of various kinds including not least his identification by the shopkeeper involved in the second robbery. So far as Smith was concerned, the most direct evidence against him was the finding of his fingerprint together with items of clothing jettisoned after the amusement arcade robbery in the outhouse nearby. But there was other evidence against him too.

THE MAKING OF THE TAPES

Bailey was arrested on June 4, Smith on June 5. On June 5 and 6, both were interviewed at length in the presence of their solicitors. Both exercised their right to silence. On the evening of June 6, both appellants were charged with conspiracy to commit robberies in the Nottingham area between January 1 and June 5, 1990.

On the following day, June 7, the officer in charge of the investigation, D.C.I. Warburton, sought and obtained from the Deputy Chief Constable permission to install listening equipment in one of the remand cells. As Mr. Warburton frankly stated in evidence on the *voir dire*: “I needed more evidence if possible.”

On June 8 the equipment was installed. The same day the appellants appeared at the Magistrates' Court. The police asked the Crown Prosecution Service to apply to the court for a remand in police custody, the stated object being to put these three men up on identification parades.

Upon the appellants’ arrival back at the police station on the evening of June 8, the police were intent upon putting them into the same cell and, understandably, intent too upon allaying any suspicions they might have about the cell being bugged. To this end they acted out a scene (a charade as the trial judge called it) whereby they pretended that, so far from the investigating officers being anxious to put both men into the same cell, this was in fact quite contrary to their wishes and instead forced upon them by an uncooperative custody officer.

The scheme worked. Smith's very first words to Bailey when they found themselves together in the cell indicated that he had in fact been entirely reassured (fooled) by the police officers' play-acting. Lulled as they thus were into a false sense of security, the two accused then embarked upon a series of conversations which, all now agree, contained a number of most damning admissions.

THE APPEAL

The appellants claimed, *inter alia*, that the evidence had been obtained illegally (contrary to PACE) and as such should not have been admitted as evidence.

Held: Appeals dismissed.

HELD: The stratagem used by the police to obtain admissions, which was not done oppressively or so as to render the admissions unreliable, was not in breach of the Police and Criminal Evidence Act 1984 or the codes of practice made thereunder, and since the confession evidence was voluntary and lawfully obtained, the judge properly exercised his discretion to admit it at the trial.

“Where, as here, very serious crimes have been committed—and committed by men who have not themselves shrunk from trickery and a good deal worse—and where there has never been the least suggestion that their covertly taped confessions were oppressively obtained or other than wholly reliable, it seems to us hardly surprising that the trial judge exercised his undoubted discretion in the manner he did.

“If, contrary to our view, evidence of this sort is generally to be regarded as undesirable and inadmissible, then in our judgment it is for the Codes to be extended accordingly. As the legislation and Codes presently stand, we do not think it unlawful to have obtained, nor unfair to have admitted, these taped conversations.” per Simon Brown LJ at p.375

70.3 Evidence obtained by undercover police acting as contract killers is admissible in evidence, unless the manner of obtaining it is so unfair that it ought to be excluded.

70.4 ***R. v. Smurthwaite*** **(1994) 98 Cr App R 437**

S and G, in two separate cases, were convicted of soliciting to murder their spouses. In each case, the police sent undercover officers to pose as contract killers and secretly recorded the conversations. The appellants contended that the police were acting as agents provocateurs and that all the evidence obtained by a trick or which included an element of entrapment ought to be excluded under the Police and Criminal Evidence Act 1984 s.78 .

Held: Appeals dismissed.

The judge had no discretion to exclude admissible evidence merely on the ground that it had been improperly obtained. The provisions of s.78 did not alter the substantive rule of law that entrapment or use of an agent provocateur did not *per se* afford a defence. The judge had a discretion to exclude the evidence if he thought that the obtaining of it would have such an adverse effect on fairness that he ought not to admit it. In these cases, the evidence of the secret tapes had been properly admitted

70.5 The fact that evidence has been obtained in breach of Article 8 of the ECHR may be relevant to the exercise of the s.78 power, but the effect of the breach turns on its significance to the fairness of the proceedings.

70.6 ***R. v. Khan (Sultan)*** **[1997] AC 558**

Khan appealed against the dismissal of his appeal against conviction of being knowingly concerned in the importation of a Class A controlled drug, heroin.

The appeal turned on whether criminal evidence amounting to an admission obtained by means of an electronic listening device installed by the police was admissible, and if so, whether it should have been excluded under the Police and Criminal Evidence Act 1984 s.78 .

Khan, who had visited a private house which was under surveillance, argued that, as there was no statutory regulation of the use of covert listening devices, statements made during the course of a private conversation should not have been admitted, especially in a case where the attachment of the device to a private house without the knowledge of its owners or occupiers had given rise to damage to property and trespass.

It was further argued that the evidence was obtained in breach of the European Convention on Human Rights 1950 Art.8 .

Held: Appeal dismissed.

There was no right of privacy in English law and relevant evidence remained admissible, despite being obtained improperly or unlawfully, subject to the court's discretion to exclude it.

Although an apparent breach of Art.8 of the Convention could be relevant in considering whether to exclude evidence, it was not determinative *per se*, as an appellant's rights were safeguarded under s.78 of the 1984 Act which provided for a review of the admissibility of evidence.

A majority of the House of Lords expressed the view that in the instant case it was unnecessary to decide whether a right of privacy existed in English law.

70.7 As long as evidence is authentic, probative and relevant, it should not be excluded just because it was obtained unlawfully.

70.8 ***R. v. Chalky and Jeffries*** **(1998) 2 Cr App R 79**

The defendants were suspected of planning serious robberies. With the permission of the chief constable the police reopened an investigation into a credit card fraud concerning the first defendant to enable them to arrest him and install a listening device in his home during his absence. Evidence of covert tape recordings of the defendants' conversations thus obtained and of police observation of the defendants and their possession of firearms and the paraphernalia of robbery was adduced at their trial for conspiracy to commit robbery.

The defendants initially pleaded not guilty, but changed their pleas to guilty after the judge ruled that the first defendant's arrest for credit card fraud was not rendered unlawful by the fact that the motive

for it was to enable investigation and/or prevention of other serious offences, and that therefore evidence of the tape recorded conversations, the authenticity, content and effect of which the defendants did not challenge, had not been unlawfully obtained and ought not to be excluded under section 78 of the Police and Criminal Evidence Act 1984 .

On appeal by the defendants against conviction:-

Held: Appeal dismissed.

The authorities showed that the concept of a plea being "founded upon" an erroneous ruling on a point of law was to be narrowly interpreted and it could not be applied to the facts of the instant case.

70.9 ***R. v. P*** **[2002] 1 AC 146 (SC)**

The appellants, British citizens, were each charged on three counts of assisting in the United Kingdom in the commission of drug offences in European Union countries A and B, contrary to section 20 of the Misuse of Drugs Act 1971 .

In October 1998, a public prosecutor of country A had obtained an order from a magistrate authorising the interception of telephone calls by and to X, a national of that country. Calls made or received by X using his mobile telephone could be monitored when he was in England or elsewhere outside country A.

The intercepts resulted in tape recordings being made of telephone conversations between X and each appellant. The telephone calls were made from country A to the United Kingdom, or from the United Kingdom to country A, or when both parties were in either England or country A. In all cases the intercepts and recordings were made in country A in accordance with the law of that country.

Pursuant to a request by the English prosecuting authorities, a district court judge of country A made an order for release to them of the recordings. The Crown proposed to put the recordings in evidence as part of its case at the appellants' trial. It also intended to call X as a prosecution witness.

At a preparatory hearing, the trial judge rejected the appellants' submission that the recordings were inadmissible in evidence. He further declined to exercise his discretion to exclude them under section 78 of the Police and Criminal Evidence Act 1984. The Court of Appeal (Criminal Division) dismissed the appellants' appeal.

THE APPEAL

Held: Appeal dismissed.

Although the use made of a telephone intercept could be an "interference" with a person's rights within article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, no breach of article 8 had been shown since all had been done pursuant to statutory authority and subject to judicial supervision.

The criteria to be applied in determining whether a person would have a fair hearing within article 6 of the Convention were the same as those to be applied under section 78 of the 1984 Act, where the judge had to consider the effect that the admission of the evidence would have on the fairness of the trial. It was a cogent factor in favour of admitting the intercept evidence that X was going to give evidence at the trial and the judge had been entitled to rule in favour of its admission.

There was no rule of public policy, independently of statute, that intercept evidence should not be used at a criminal trial; and where secrecy was not required in the public interest, it was "necessary in a democratic society" within article 8(2) of the Convention for all relevant and probative evidence, including intercept evidence obtained abroad, to be admissible to assist in the apprehension and conviction of criminals and ensure that their trial was fair.

70.10 **R. v. King [2012] EWCA Crim 803**

Joseph King was found guilty of various offences relating to drug dealing and possession of firearms.

The evidence against him included a secretly recorded conversation he had with a co-accused called Matthew Newin, whilst they were left 'alone' together in the back of a police van. During the 6 minutes they thought they were not being monitored, they spoke together in a Romany dialect called Rokker.

Both of them made remarks which implicated them in the supply of drugs. They discussed a cover story which both would give to the police, namely that Newin had arrived at Hoath Wood to buy chickens from King.

King appealed, *inter alia*, on the basis that the evidence of the recorded conversation should have been excluded under s.78 of PACE.

It was submitted that the investigating officers acted in deliberate breach of their duty under section 30 of PACE by not taking the suspects to a police station as soon as practicable, but rather deliberately locking them in a stationary van, supposedly unobserved, in the hope that they would confess to each other – which they did.

That this was the police plan was undoubted, as DI Edward Fox had issued a written policy decision before the arrest, which said:

"If Newin meets with an occupant of Hoath Wood both arrested persons will be placed for a period of time together in a police vehicle with recording facilities. Should there be more than two persons DS McDermott will determine who should be placed in the vehicle with Newin. If Joe King is one of those, he will be the priority. They will be left unsupervised and their presence and any conversation will be recorded. No police officer will engage in any questioning of either and will not seek to promote any conversation between them."

Nowhere did he refer to the s.30 duty, either by way of a reminder or to authorise the delay.

At the trial, DI Fox justified his decision by referring to *R. v. Bailey and Smith* [1993] 97 Cr App R 365.

The trial judge held that in the complex circumstances, there had not been a breach of s.30; or, even if there had, it was not so significant as to have an adverse effect on the fairness of the proceedings.

THE APPEAL

Held: Appeals dismissed.

(1) The judge had been entitled to conclude that there had been no breach of s.30. First, there was no evidence to indicate that the investigating officers had deliberately delayed for the purpose of securing the recording. Second, the geography of the site and the nature of the operation were such that there was good reason for the judge to accept the evidence of the officers on the issue of delay.

(2) The judge had also been entitled to conclude that, if there had been a breach of s.30, the fairness of the proceedings had not been affected. It was true that the policy behind s.30 was to bring the suspect, as soon as practicable, within the protection of Code C. The movement of a suspect from place to place, or his prolonged detention away from a police station, delayed his entitlement to the safeguards provided by Code C. However, the fact alone of a breach of s.30 would not place evidence obtained as a result of the delay into a separate category which rendered unfairness a presumption.

(3) Each case had to be examined on its own particular facts for an assessment of the fairness of the proceedings. The deliberate flouting of a statutory duty for the purpose only of creating an opportunity for a covert recording might, depending on the circumstances, result in the exclusion of evidence. However, this was not such a case: during the period of an hour while K and N were under arrest and awaiting developments, they remained under the supervision of police officers, who did not engage them in conversation about their arrest; the placement of K and N in the same police car provided no more than an opportunity for them to speak together in the belief that they were not being overheard; no trick or subterfuge was practised on them so as to lead them to believe that they had to make some response to their arrests.

Furthermore, the covert recording took place before interview under caution but that fact placed them at no greater disadvantage than if they had been covertly recorded in police custody after interview under caution.

71 INTERCEPTED COMMUNICATIONS

71.1 Despite the general rule that logically probative evidence is admissible, there is a specific statutory exception relating to evidence gained from the unlawful interception of a communication sent either by a public postal service or a public telecommunications service.

71.2 The Investigatory Powers Act 2016 is the successor to the Regulation of Investigatory Powers Act 2000; which is itself the successor to the Interception of Communications Act 1985.

71.3 **The Investigatory Powers Act 2016**

3 Offence of unlawful interception[30]

(1) A person commits an offence if—

(a) the person intentionally intercepts a communication in the course of its transmission by means of—

(i) a public telecommunication system,

(ii) a private telecommunication system, or

(iii) a public postal service,

(b) the interception is carried out in the United Kingdom, and

(c) the person does not have lawful authority to carry out the interception.

71.4 Under the normal principles, one would expect that evidence illegally obtained by intercepting a phone-call etc. would be admissible in evidence, subject to the judge's discretion to exclude it either at common law or under PACE s.78.

71.5 However, a further section of the Act casts doubt on that idea.

71.6 **The Investigatory Powers Act 2016**

56 Exclusion of matters from legal proceedings etc[31]*.*

(1) No evidence may be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings or Inquiries Act proceedings which (in any manner)—

(a) discloses, in circumstances from which its origin in interception-related conduct may be inferred—

(i) any content of an intercepted communication, or

(ii) any secondary data obtained from a communication, or

[30] This is the same as s.1 of the Regulation of Investigatory Powers Act 2000.
[31] This is the same as s.17 of the Regulation of Investigatory Powers Act 2000.

(b) tends to suggest that any interception-related conduct has or may have occurred or may be going to occur.

This is subject to Schedule 3 (exceptions).

(2) "Interception-related conduct" means—

(a) conduct by a person within subsection (3) that is, or in the absence of any lawful authority would be an offence under section 3(1) (offence of unlawful interception)…

71.7 This means that no evidence can be given that would reveal its source as being an intercepted communication.

71.8 It is not a prohibition on the evidence itself being given, but in practice it would be virtually impossible to use the evidence without revealing its source. Even if the prosecution can introduce the evidence without alluding to the intercept, the defendant would almost certainly wish to explore the source of it. If he were prevented from doing so under s.56, this would infringe his rights under Article 6 of the European Convention.

71.9 ***Morgans v. DPP*** **[2001] 1 AC 315**

Morgans appealed against part of a decision dismissing his appeal against a decision upholding his conviction of fraudulently using a telecommunication system under the Telecommunications Act 1984 s.42 .

The evidence on which the prosecution case was based had been obtained by placing a call logging system on Morgans' telephone line, without obtaining a warrant. Printouts from the system established that it had been used to secure access to the computer systems of certain companies, thereby gaining unauthorised access to outside telephone lines at the companies' expense. Morgans argued that under the Interception of Communications Act 1985 s.9(1) , evidence obtained in breach of s.1 of that Act would be inadmissible. Section 1 stated that the intercepting of a communication was an offence. It had been held by the Divisional Court that s.9 merely prohibited questions regarding the way in which the evidence was obtained, but not its actual admissibility.

Held: Appeal allowed.

s.1 and s.9 of the 1985 Act disallowed the admission of evidence obtained by intercepting communications by a person listed in s.9(2), except where that evidence was obtained in accordance with s.1(3) of the 1985 Act. The Act preserved the practice of separating acts of surveillance from the prosecution of offenders, *R. v Preston (Stephen) [1994]* applied. As the intercept had been made without a warrant, questioning was prohibited both as to the circumstances surrounding the intercept and the evidence obtained as a result.

"Evidence of material obtained by the interception by the persons mentioned in section 9(2) of the 1985 Act of communications of the kind described in section 1(1) of that Act, except for the purposes described in section 1(3), will always be inadmissible. It is not possible to say that section 9(1) of the Act provides for this in express language. But, in the context of the Act as a whole, the prohibitions which it contains lead inexorably to that result. So, I would hold that it has that effect by necessary implication." per Lord Hope at p.338

71.10 The purpose of this prohibition is *inter alia* to ensure that the police cannot be quizzed on how they carry out covert operations etc. and arose out of a case called Malone v. UK (1984) 7 EHRR 14, a case in which the European Court of Human Rights criticised the lack of precision, accessibility and formal safeguards in the area of communications intercepts in the UK.

71.11 However, the courts have been perplexed by exactly what the section means.

Regina Respondent v Preston (Stephen) **[1994] 2 A.C. 130**

This case concerned the identical provisions of the Interception of Communications Act 1985.

"If the purpose of Parliament was to allow the intercept materials to become part of the prosecution process it is hard to see any point in a provision which would make it wholly or at least partially (according to how the section is read) impossible to use them in that process; and if that had been the intention it is equally hard to understand why Parliament did not say so in plain language.

"By contrast, on the narrower reading of section 2 there would be no need to make explicit provision for the admissibility of materials which by virtue of section 6 would no longer exist, and the purpose of section 9 can be seen as the protection, not of the fruits of the intercepts, but of information as to the manner in which they were authorised and carried out. Inquiries as to these matters were to be confined to the tribunal under section 7, and the defendant was not to have the opportunity to muddy the waters at a trial by cross-examination designed to elicit the Secretary of State's sources of knowledge or the surveillance authorities' confidential methods of work. Evidently the proscription of questioning on the existence of warrants was seen as an economical means of achieving this result."

per Lord Mustill at p.167

72 LIMITATIONS ON THE ACT

72.1 The Act only applies to 'interceptions', so does not apply to a recording of a telephone conversation other than by tapping the wire.

R. v. E **[2004] 1 WLR 3279**

In the course of an investigation into suspected drug dealing police placed in the defendant's car a covert listening device which recorded words spoken by the defendant when in the car.

The device recorded the defendant's end of telephone conversations on his mobile telephone but did not pick up any speech from the person on the other end of the telephone.

The defendant was charged on indictment with offences of conspiracy to supply controlled drugs.

It was held that this did not amount to an interception of the call.

"In our view, the natural meaning of the expression "interception" denotes some interference or abstraction of the signal, whether it is passing along wires or by wireless telegraphy, during the process of transmission. The recording of a person's voice, independently of the fact that at the time he is using a telephone, does not become interception simply because what he says goes not only into the recorder, but, by separate process, is transmitted by a telecommunications system. That view is consistent with the expressions contained in the Act to which we have drawn attention."

per Rix LJ at para 20

72.2 It is also not an 'interception' to record your own telephone conversation.

R. v. Hardy and Hardy **[2003] 1 Cr App R 30**

Brian Hardy and his son Danny Hardy appealed against their convictions for conspiracy to supply a Class B controlled drug. At their trial, the judge had ruled that tape recordings of face to face conversations and telephone conversations between the appellants and two undercover police officers were admissible. The issues raised by their appeals included (1) whether the recordings amounted to telephone tapping and (2) whether the conduct of the police officers amounted to surveillance and, if so, whether proper authorisation had been given.

Held, dismissing the appeals, that (1) for one party to a telephone conversation to make a tape recording of that conversation did not amount to the interception of a communication in the course of its transmission by means of a telecommunication system within the meaning of the Regulation of Investigatory Powers Act 2000 s.2(2), and (2) whilst the conduct of the police officers did amount to surveillance within the meaning of s.26(1)(c) of the Act, proper authorisation had been given.

"The position of a telephone conversation which is intercepted and overheard by a third party, unknown to one or both of the parties to it, is different. Such a conversation may legitimately be regarded by the two speakers as something which could only be revealed by one of them. That is what is separately provided for as 'interception' for the purposes of the 2000 Act." para 35

TUTORIAL EXERCISES

Exercise One

Barrie is accused of stealing 50 computers to a value of £50,000 from London Metropolitan University.

It is alleged that he took them from a store-room in the university over a number of days, concealed in various bags and suitcases, and then sold them for £30,000 cash on a stall at Borough Market on August 1st 2020.

Consider the type, relevance and weight of the following pieces of evidence.

1. Barrie has worked at the university for 30 years and is a highly trusted member of staff.

2. Barrie's job has recently been made redundant, so he will have to leave the university in October 2020, with no other job lined up.

3. Barrie has not been on holiday for 20 years, but has recently booked an expensive world cruise.

4. Barrie has recently deposited £30,000 in his bank account.

5. After 5 hours in a police station with no legal representation, Barrie admitted stealing the computers.

6. A witness claims to have seen a man selling computers on Borough Market on August 1st. The description he has given of this man generally matches Barrie, but the man in question was wearing a beanie hat, so the witness could not see his hair (if any).

7. Barrie's wife was told by her friend, Mary, that she had bought one of the computers from Barrie at Borough Market.

8. Barrie claims he was in Manchester on August 1st watching a play at the Lowry Theatre. He has the ticket stub.

9. Barrie was charged with stealing stationery from the university in 2015, but the charges were dropped through lack of evidence.

10. In common with all the other university staff, Barrie has easy access to the computer store-room.

Exercise Two

What legal and evidential burdens may arise from this statute?

Selfish Disturbances by Audiences Act 2020

An Act to prohibit members of the audiences of live entertainment shows from causing unwarranted disturbances to other members of the audience.

s.1 Offence of causing unnecessary disturbances by noise

(1) It is an offence for a person deliberately to wrap, unwrap or otherwise handle any food or drink wrappings during the course of a live entertainment if this creates a noise audible to anyone else in the audience.

(2) It is an offence for a person deliberately to eat or prepare to eat, drink or prepare to drink anything in a live entertainment venue during the course of the event if this creates a noise audible to anyone else in the audience or an odour which can be detected by anyone else in the audience.

(3) It is an offence for a person deliberately to speak, whisper, sing or make any other sort of deliberate verbal noise in a live entertainment venue during the course of the event unless specifically called upon to do so by the performers in the entertainment as part of genuine audience participation.

s.2 Offence of causing unnecessary disturbances by use of devices

(1) It is an offence for a person being a member of the audience at a live entertainment event to switch on or to use any electronic device during the event.

(2) For the purpose of subsection 1 of this section, 'electronic device' includes, but is not restricted to, any device that emits light and/or sound, such as mobile telephones, computers, cameras and watches,

s.3 Offence of permitting disturbances by audiences

(1) It is an offence for any person who is managing a live event to permit members of the audience to commit the offences in sections 1 and 2 above.

(2) It is an offence for any person who is managing a live event to fail to take reasonable steps to prevent members of the audience from committing the offences in sections 1 and 2 above.

s.4 Defences

In any proceedings against any person for an offence under sections 1 and 2 above it is a defence for him to show that at the time he made the disturbances he reasonably believed that he had cause to do so for either health or safety reasons.

s.5 Penalties

(1) A person guilty of an offence under sections 1 or 2 shall be liable on conviction to imprisonment for a term not exceeding 25 years or to an unlimited fine or both.

(2) A person guilty of an offence under section 3 shall be liable on summary conviction to a fine not exceeding level five.

Exercise Three

Barrie manages a small theatre in London. On an unannounced visit by a local health and safety inspector, the inspector claims to have discovered Barrie and four other people smoking cigarettes inside the building.

Barrie is charged with offences contrary to the Health Act 2006.

As the Counsel for the Prosecution, explain what evidence you might amass in order to prove the case against him, and what issues of relevance, admissibility and weight may arise.

Examine also what burdens and reverse burdens of proof may arise from the statute, and how these might be interpreted and handled by the court.

Health Act 2006

s.1 Introduction

(1) This Chapter makes provision for the prohibition of smoking in certain premises, places and vehicles which are smoke-free by virtue of this Chapter.

(2) In this Chapter—

(a) "smoking" refers to smoking tobacco or anything which contains tobacco, or smoking any other substance, and
(b) smoking includes being in possession of lit tobacco or of anything lit which contains tobacco, or being in possession of any other lit substance in a form in which it could be smoked.

(3) In this Chapter, "smoke" and other related expressions are to be read in accordance with subsection (2).

s.2 Smoke-free premises

(1) Premises are smoke-free if they are open to the public.

But unless the premises also fall within subsection (2), they are smoke-free only when open to the public.

(2) Premises are smoke-free if they are used as a place of work—

(a) by more than one person (even if the persons who work there do so at different times, or only intermittently), or
(b) where members of the public might attend for the purpose of seeking or receiving goods or services from the person or persons working there (even if members of the public are not always present).

They are smoke-free all the time.

(3) If only part of the premises is open to the public or (as the case may be) used as a place of work mentioned in subsection (2), the premises are smoke-free only to that extent.

(4) In any case, premises are smoke-free only in those areas which are enclosed or substantially enclosed.

(5) The appropriate national authority may specify in regulations what "enclosed" and "substantially enclosed" mean.

(6) Section 3 provides for some premises, or areas of premises, not to be smoke-free despite this section.
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(7) Premises are “open to the public” if the public or a section of the public has access to them, whether by invitation or not, and whether on payment or not.

(8) “Work”, in subsection (2), includes voluntary work.

s.3 Smoke-free premises: exemptions

(1) The appropriate national authority may make regulations providing for specified descriptions of premises, or specified areas within specified descriptions of premises, not to be smoke-free despite section 2.

(2) Descriptions of premises which may be specified under subsection (1) include, in particular, any premises where a person has his home, or is living whether permanently or temporarily (including hotels, care homes, and prisons and other places where a person may be detained).

(3) The power to make regulations under subsection (1) is not exercisable so as to specify any description of—

(a) premises in respect of which a premises licence under the Licensing Act 2003 (c. 17) authorising the sale by retail of alcohol for consumption on the premises has effect,

(b) premises in respect of which a club premises certificate (within the meaning of section 60 of that Act) has effect.

(4) But subsection (3) does not prevent the exercise of that power so as to specify any area, within a specified description of premises mentioned in subsection (3), where a person has his home, or is living whether permanently or temporarily.

(5) For the purpose of making provision for those participating as performers in a performance, or in a performance of a specified description, not to be prevented from smoking if the artistic integrity of the performance makes it appropriate for them to smoke—

(a) the power in subsection (1) also includes power to provide for specified descriptions of premises or specified areas within such premises not to be smoke-free in relation only to such performers, and

(b) subsection (3) does not prevent the exercise of that power as so extended.

(6) The regulations may provide, in relation to any description of premises or areas of premises specified in the regulations, that the premises or areas are not smoke-free—

(a) in specified circumstances,

(b) if specified conditions are satisfied, or

(c) at specified times,

or any combination of those.

(7) The conditions may include conditions requiring the designation in accordance with the regulations, by the person in charge of the premises, of any rooms in which smoking is to be permitted.

(8) For the purposes of subsection (5), the references to a performance—

(a) include, for example, the performance of a play, or a performance given in connection with the making of a film or television programme, and

(b) if the regulations so provide, include a rehearsal.

s.7 Offence of smoking in smoke-free place

(1) In this section, a “smoke-free place” means any of the following—

(a) premises, so far as they are smoke-free under or by virtue of sections 2 and 3 (including premises which by virtue of regulations under section 3(5) are smoke-free except in relation to performers),

(b) a place, so far as it is smoke-free by virtue of section 4,

(c) a vehicle, so far as it is smoke-free by virtue of section 5.

(2) A person who smokes in a smoke-free place commits an offence.

(3) But a person who smokes in premises which are not smoke-free in relation to performers by virtue of regulations under section 3(5) does not commit an offence if he is such a performer.

(4) It is a defence for a person charged with an offence under subsection (2) to show that he did not know, and could not reasonably have been expected to know, that it was a smoke-free place.

(5) If a person charged with an offence under this section relies on a defence in subsection (4), and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding a level on the standard scale specified in regulations made by the Secretary of State.

s.8 Offence of failing to prevent smoking in smoke-free place

(1) It is the duty of any person who controls or is concerned in the management of smoke-free premises to cause a person smoking there to stop smoking.

(2) The reference in subsection (1) to a person smoking does not include a performer in relation to whom the premises are not smoke-free by virtue of regulations under section 3(5).

(3) Regulations made by the appropriate national authority may provide for a duty corresponding to that mentioned in subsection (1) in relation to—

(a) places which are smoke-free by virtue of section 4,

(b) vehicles which are smoke-free by virtue of section 5.

The duty is to be imposed on persons, or on persons of a description, specified in the regulations.

(4) A person who fails to comply with the duty in subsection (1), or any corresponding duty in regulations under subsection (3), commits an offence.

(5) It is a defence for a person charged with an offence under subsection (4) to show—

(a) that he took reasonable steps to cause the person in question to stop smoking, or

(c) that on other grounds it was reasonable for him not to comply with the duty.

(b) that he did not know, and could not reasonably have been expected to know, that the person in question was smoking, or

(6) If a person charged with an offence under this section relies on a defence in subsection (5), and evidence is adduced which is sufficient to raise an issue with respect to that defence, the court must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(7) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding a level on the standard scale specified in regulations made by the Secretary of State.

(8) The references in this section, however expressed, to premises, places or vehicles which are smoke-free, are to those premises, places or vehicles so far as they are smoke-free under or by virtue of this Chapter (and references to smoke-free premises include premises which by virtue of regulations under section 3(5) are smoke-free except in relation to performers).

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Exercise Four

Paul, Quentin, Rita, Silas and Tammy are arrested for burglary. Each makes a confession which they seek to have excluded at trial.

Advise each defendant on the admissibility of their confessions.

(a) Paul was told by the police: “We have your fingerprints all over the windowsill.” When he heard this, he confessed. However, no fingerprints had in fact been found.

i. Does it make any difference whether his solicitor was present at the interview?
ii. Does it make any difference if, as a result of the confession, the police searched Paul’s house and found some of the stolen items there?

(b) Quentin is a heroin addict. He knew that in a few hours he would begin to get withdrawal symptoms, and was therefore desperate to get out of the station as soon as possible. However, the police said that they would need several further interviews with him, which would take hours, and he confessed to get out earlier.

Does it make any difference whether or not the police knew about his addiction?

(c) Rita asked for a solicitor but the police refused to allow her access to legal advice. Initially, they refused on the basis that other suspects may be alerted (which they may or may not have believed), and Rita made some admissions. They then admitted that there was no risk of other suspects being alerted, but continued to refuse to allow Rita access to a solicitor. She then made a full confession.

i. Does it make any difference that Rita has been a career criminal for 20 years?
ii. Does it make any difference if Rita was later given access to a solicitor, and made the same confession?

(d) After 14 hours of detention without any food, Silas admitted being on the street where the burglary happened at the time of the crime, but said this was just to visit his cousin who lives in the adjoining house.

(e) Tammy told the police that she was in Italy at the time of the crime, but later admitted to being in the street where the burglary took place.

Exercise Five

Barrie is charged with murder. It is alleged that on October 29th, he attended a performance of the opera 'The Mikado' at the Royal Opera House. He was sitting on the second row of the dress circle. During the performance, the woman directly in front of him switched on her mobile phone and accessed Facebook. He leant forward and asked her to switch the phone off. She refused and stood up and turned around infront of him so that he could not see the stage. Barrie pushed her over the balcony. His defence is that he was merely trying to grab the phone off her, and she slipped backwards.

Discuss the admissibility of the following evidence:

i. Barrie is notorious for his intolerance of people who misbehave in theatres.

ii. Barrie was once forcibly removed from a theatre for swearing at an usher who did not stop people from taking photographs during a show.

iii. This is the third time that someone has fallen over the balcony of a theatre where Barrie has been present.

iv. Barrie states in the trial that he is an extremely patient and docile person. The prosecution wishes to bring evidence refute this.

v. Barrie belongs to a Facebook group called: "Vengeance on Audience Plebs" which shares ideas about how to get revenge on inconsiderate theatre-goers.

Exercise Six

"The reforms to the right to silence made by the Criminal Justice and Public Order Act 1994 have given a disproportionate advantage to the prosecution by effectively compelling the defendant to say something to establish his innocence."

Critically examine this statement

Exercise Seven

Peter Partridge has been charged with the murder of Simon Seagull.

Peter and Simon used to be best friends. Peter had a girlfriend from Cuba called Roberta Robin, but she became frightened of him because of his violent mood swings and found solace in the arms of Simon, with whom she started to have an affair.

It is alleged that Peter followed Simon home from the pub one night and stabbed him with a Samurai sword in a dark alley. Peter denies having even seen Simon that evening, or having ever owned or used a Samurai sword.

Roberta gave a written statement to the police in which she recalled how Simon had told her about threats that Peter had made to him, saying that he would get his revenge on him for stealing his girlfriend.

Roberta has now returned home to Cuba and has indicated that she is too scared of Peter to come back to England for his trial.

Advise the prosecution which wishes to have the following evidence admitted:

Roberta's written statement.

i. Entries from Simon's diary in which he mentions the threats from Peter.

ii. A written statement from a witness who claims to have seen Peter at the scene of the attack, but whom the police have since been unable to trace.

iii. A letter written to Peter from his mother, stating how disappointed she was that he treated Roberta so badly. Peter's mother has since been diagnosed with paranoid schizophrenia and has been certified unfit to give testimony in court.

iv. A text message sent by Simon to Roberta's phone shortly before he was attacked, saying that he thought he was being followed by Peter.

v. A receipt from a specialist weaponry shop in Japan, showing that Peter bought a ceremonial Samurai sword when he was on holiday in Tokyo 10 years ago.

Exercise Eight

Answer ALL FOUR questions in this part.

Rose Maybud, a professional electrician, has been charged with the murder of her third husband, Ash. Ash died from electrocution as a result of faulty wiring in a power drill he was using to erect some bookshelves at their home. Rose's first husband, Hickory, supposedly died as a result of electrocution whilst he was shaving with an electric razor which he dropped in the bath, causing it to short-circuit. Rose's second husband, Bramble, supposedly died as a result of electrocution whilst using a toaster when he tried to recover some stuck toast from the live mechanism using a metal knife.

In the cases of Hickory and Bramble, the coroner recorded a verdict of accidental death, and in both cases, Rose was awarded a substantial sum from their life insurance policies. Due to her extravagant lifestyle, she had spent all the money by the time she married Ash. However, she stands to benefit to the sum of £1,000,000 from the life insurance on Ash.

It is alleged that Rose rewired the power drill so that it would give Ash a fatal electric shock. It is Rose's defence that Ash's death was as a result of an inherent defect in the power drill, which had nothing to do with her.

With reference to cases, statutes and conventions, advise on the admissibility of the following evidence at the trial of Rose, including, where relevant, advice on how the judge should direct the jury.

QUESTION ONE

Rose was arrested and taken to the police station for questioning. She was given the statutory caution and was asked by P.C. Ivy if she wanted to have the services of a solicitor. Rose replied: "How could I afford a solicitor? I have no money left!" No solicitor was called for.

Rose was then locked in a police cell for eight hours, before being brought before D.C. Tulip and D.C. Daffodil for questioning. Tulip asked her why she had killed Ash, to which Rose replied: "I cannot answer that!"

Tulip said: "Well you had better try, or we will be here for a very long time."
Daffodil said: "Or we could try some of our special methods to speed things up a bit!"

Daffodil then produced a gory photograph of Ash's burnt body and shouted at Rose: "Look what you've done! You're a monster! Just admit it!"

Rose screamed when she saw the photograph, and said: "How could I have done that? And to the man I love!"

QUESTION TWO

Rose's Peruvian maid, Alstroemeria, told her friend Lily about a conversation she had with Rose a week before the death of Ash. Rose was behind in paying Alstroemeria's wages, but told her: "Don't worry. This time next week, I will be a millionaire!"

Alstroemeria returned to live in Peru immediately after the death, and refuses to come back to England to give evidence. The prosecution wishes to call Lily to give testimony of the conversation instead.

QUESTION THREE

Before arresting Rose, the police had put an unlawful tap on her phone in order to monitor her calls. In one call, Ash's mother, Orchid, had called Rose and said to her: "You have murdered my son, just like you did with all the rest! Why don't you just admit it?"

Rose replied: "Drop dead!" and hung up.

The prosecution wishes to use the recording of this conversation in evidence.

QUESTION FOUR

The prosecution wishes to produce evidence relating to the deaths of Rose's first two husbands.

Exercise Nine

With reference to legal and evidentiary burdens of proof, critically discuss whether the presumption of innocence is sufficiently protected in English law.

Exercise Ten

Critically discuss the measures taken under English law to protect a defendant from the potential miscarriages of justice which may arise from a false identification.